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THE LAW

RELATING TO

BUILDING SOCIETIES.

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THE LAW

RELATING TO

BUILDING SOCIETIES.

BY

EDWARD ALBERT WURTZBURG,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

FIFTH EDITION.

LONDON:

STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE,

Law Publishers.

1920

PREFACE

TO THE FIFTH EDITION.

In preparing the present edition, the modern and very convenient practice of giving the date of every decision cited has been adopted. And as building societies on the English model are now established in some of our principal Dominions, and the English authorities are frequently cited and followed in their Courts, all such cases in the Dominion Reports as seemed likely to be of use have been inserted.

It has not been considered necessary to reprint the Appendices which formerly appeared at the end of the book. They consisted to a great extent of a reprint of the Building Societies Acts and Regulations, and it may be assumed that every lawyer interested in the subject already possesses a copy of these. The whole work has been thoroughly revised and brought up to date.

E. A. W.

Lincoln's Inn,
November, 1919.

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THE LAW

RELATING TO

BUILDING SOCIETIES.

CHAPTER I.

THE NATURE AND OPERATIONS OF A BUILDING SOCIETY.

Nature of a building society.

A BUILDING society is not a joint stock company, still less is it a common law partnership; it is an association of a special kind formed and regulated under particular Acts of Parliament for special purposes, and the rights and liabilities of the members depend upon the contract into which they have entered and which is to be found in the rules of the society (*a*). It may be defined as an association of persons subscribing to a common fund, which is to be employed in making advances to such of the members as desire to obtain them on the security of real or leasehold property. The members are of two classes—unadvanced or investing members, who merely

(*a*) See *per* Lord Selborne, L. C., *Brownlie* v. *Russell* (1883), 8 App. Cas. p. 248; 48 L. T. 881; 47 J. P. 757; 10 Rettie (H. L.), 19; 20 Sc. L. R. 481, cited *post*, p. 382; and the judgment of Lindley, L. J., in *Durham and Northumberland Working Men's Permanent Building Society* v. *Davidson* (1892), 61 L. J. Q. B. p. 473; 67 L. T. 269; 56 J. P. 660. An incorporated society was, however, "deemed to be a company within the meaning of the Companies (Winding-up) Act, 1890" (Building Societies Act, 1894, s. 8), and may, accordingly, be wound up under the Companies (Consolidation) Act, 1908; see *infra*, p. 362.

CHAP. I. pay their subscriptions and other contributions into the coffers of the society, generally receiving interest in some shape or other for the sums so paid; and advanced or borrowing members, who obtain an advance from the society on mortgage of real or leasehold estate. Advanced members may at any time redeem their securities, and unadvanced members may retire from the society, or, as it is termed, "withdraw," on such terms as the rules prescribe. In the preamble to the Building Societies Act of 1836 (*b*), which is the earliest legislative enactment on the subject, these societies are said to have been established in different parts of the kingdom, principally amongst the industrious* classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property. And in the Building Societies Act, 1874 (*c*), they are described as societies for the purpose of raising, by the subscriptions of the members, a stock or fund for making advances to members, out of the funds of the society, upon freehold, copyhold, or leasehold estate by way of mortgage.

* *Sic.*

Building societies are distinct from freehold land societies.

Building societies must not be confounded with freehold land societies. A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a building society advances to its borrowing members money derived from the subscriptions, which the borrowing members themselves lay out in the purchase of lands or buildings and then mortgage them to the society (*d*).

(*b*) 6 & 7 Will. 4, c. 32.

(*c*) 37 & 38 Vict. c. 42, s. 13.

(*d*) *Per* Romilly, M. R., *Grimes* v. *Harrison* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 5 Jur. N. S. 528; 33 L. T. (O. S.) 115; 23 J. P. 421. A freehold land society can be wound up under the

Building societies are of two kinds: (1) Terminating; (2) Permanent.

Building societies are of two kinds, terminating and permanent.

A terminating society is a society which by its rules is to terminate at a fixed date, or when a result specified in its rules is attained (*e*). The earlier societies were all of this type, the permanent society being an invention of a later date; permanent societies are said by Sir Edward Brabrook to have been invented about 1846 (*f*). The scheme of a terminating society is somewhat as follows: The society is constituted by several persons, each subscribing for a certain number of shares. Upon each of these shares a fixed subscription is made payable so long as the society lasts, the object being to continue the society until the subscriptions, with the interest that has arisen from their investment, shall have produced such an amount per share as may have been fixed by the rules. As soon as there are sufficient funds in hand, advances are made to such members as may desire them, in anticipation of the shares which would be payable to them on the termination of the society; the sum advanced being the amount of the member's share or shares, less a discount, and the member who receives the advance executing a mortgage of real or leasehold estate to the society, for securing the due payment by him of his subscriptions and other contributions to the funds of the society. The Bowkett and Starr-Bowkett societies are both varieties of this class.

Terminating societies.

Companies (Consolidation) Act, 1908; see *Re Osmondthorpe Hall Freehold Garden and Building Allotment Society*, [1913] W. N. 243; 58 Sol. J. 13.

(*e*) Building Societies Act, 1874, s. 5.

(*f*) *Building Societies* (1906), p. 35.

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Permanent societies.

A permanent society, on the other hand, is a society which has not by its rules any fixed date or specified result at which it shall terminate (*g*). Societies of this kind, which are undoubtedly the best and most equitable, may therefore continue their operations for an indefinite period. They are constituted by the agreement of several persons to take shares of a certain fixed value, on which payment has to be made, either in a lump sum or by instalments, until the full amount of the share has been paid up; and the sums so paid generally carry interest. Advances are made to members from time to time, as the funds will permit, on the security of land or house property, the money advanced being usually made repayable by equal instalments, composed of principal and interest and spread over a fixed period.

Nature and operations of a building society.

In his judgment in *Fleming* v. *Self* (*h*), Lord Cranworth, L. C., thus describes the nature and operations of a building society. His remarks were addressed to the case of a terminating society, but they apply in great measure to permanent societies as well, and exhibit in a very clear light the different positions of advanced members, unadvanced or investing members, and withdrawing members. He said:—

"The principle is this, members subscribe monthly sums which are accumulated till the fund is sufficient to give a stipulated sum to each member, and then the whole is divided amongst them: in the society now in

(*g*) Building Societies Act, 1874, s. 5.

(*h*) (1854), 3 De G. M. & G. 997; 24 L. J. Ch. 29; 1 Jur. N. S. 25; 3 W. R. 89; 24 L. T. (O. S.) 101; 3 Eq. Rep. 14; 18 J. P. 772. For a description of an early society, see *Pratt* v. *Hutchinson* (1812), 15 East, 511.

question the sum to be raised for each member is 100*l*. If this were all it would be a very simple transaction, mere accumulation, and the only question would be how to invest the sums subscribed to the greatest advantage. But this is not all; one main object is to enable members to obtain their 100*l*. by anticipation on their allowing a large discount. For this purpose, when a sufficient fund is in the hands of the treasurer, the members who desire to get their shares in advance bid, by a sort of auction, the sum which they are ready to allow as discount, and the highest bidder obtains the advance. Thus if at the end of a year a sum of 500*l*. is in the hands of the treasurer arising from the monthly subscriptions, and the holder of ten shares is willing to allow a discount of fifty per cent. (no one offering more), the 500*l*. is or may be advanced to him, being 50*l*. in satisfaction of each of his ten shares. For this accommodation he is bound to pay monthly, till a fund is raised sufficient to give 100*l*. per share to all the other members, not only the original monthly subscription, but also a further monthly sum called redemption money. The statute (*i*) provides that the shares shall not in any society exceed 150*l*. each: in this society the shares are fixed by the rules, as I have already stated, at 100*l*. each. The amount of the monthly subscriptions and redemption money is fixed by the rules of each society; here the monthly subscription on each share is 8*s*. 6*d*., the monthly redemption money 3*s*. 6*d*.; so that the monthly payment by each member who has not received his share in advance is 8*s*. 6*d*.,

(*i*) 6 & 7 Will. 4, c. 32, s. 1.

CHAP. I. by those who have been advanced it is 12*s*. If after such an advance as I have supposed no further advance were made, the natural course of the society would be that the members, other than the holder of the ten shares, would continue their monthly subscriptions, and the owner of the ten shares would continue his monthly subscriptions and redemption money, till the fund thus raised should be sufficient to pay 100*l*. per share to every member other than the holder of the ten satisfied shares. Thus if there were one hundred shares, and at the end of the first year there was 500*l*. in hand, the condition of each shareholder before any advance made would be, that he would be bound to pay 8*s*. 6*d*. per month, say 5*l*. per annum, till by means of these payments and the 500*l*. in hand the requisite amount, that is, 10,000*l*., being 100*l*. for each 100*l*. share, should have been raised by accumulation. After the advance, the condition of every shareholder, other than the holder of the ten advanced shares, is, that he is to contribute his monthly payments till they, together with the monthly payments and redemption money contributed by the holder of the advanced shares, are sufficient to realize, not 10,000*l*. but 9,000*l*., that is, 100*l*. for each share other than the ten shares of the advanced member, whose shares will have been already satisfied by the 500*l*. He loses his interest in the 500*l*. advanced to the holder of the ten shares, but, on the other hand, the sum to be raised is only 9,000*l*. instead of 10,000*l*., and the monthly contribution is increased by the amount of the redemption money paid by the member who has received his ten shares in advance. Further advances are made from time to time as funds are

accumulated, and as members are inclined to give high discount in order to obtain payment of their shares by anticipation. The gain to the society arises mainly from the high rate of discount which members in want of money are ready to give; in truth, the whole scheme is but an elaborate contrivance for enabling persons having sums for which they have no immediate want to lend them to others at a very high rate of interest. In order to secure the due payment of the monthly subscriptions and redemption money by the members who have received their shares in advance, they are obliged to give satisfactory real security to the trustees of the society, and the statute protects such mortgages from the operation of the laws which, until last session, were in force against usury. Besides this advance to a member of his share, deducting discount, the rules provide also for the case of a member desiring to withdraw from the society altogether. By the sixteenth rule any member may withdraw on certain terms there laid down, the principle being that he is to pay a small sum by way of fine or penalty if he withdraws at an early date after the formation of the society; but if he withdraws after having been a member, and so having paid his subscriptions, for several years, then on withdrawing he is to receive back the full amount of his subscriptions, and also, if the directors think fit, a further sum to be from time to time fixed by them by way of bonus out of what are called the profits of the society. This is provided for by the sixteenth rule, which is thus. . . . . It is obvious that this is an arrangement which may, if the calculations be properly made, be carried into effect without injury to the society. When a mem-

CHAP. I. ber withdraws, the society thenceforth loses the benefit of his monthly subscriptions, but then they are relieved from the obligation of making up the 100*l*. to which he would eventually become entitled. If the member on withdrawing merely took back the amount of his subscriptions, the society would obviously benefit to the extent of the interest made by means of those subscriptions previously to the withdrawal. It is obvious that out of the interest so realized an allowance may be made to the withdrawing member, still leaving to the society some benefit from his past contributions. The sums subscribed by a member who withdraws have contributed to make up the fund out of which the shares of those members who have been advanced, that is, have taken a smaller sum at once, allowing a large discount in lieu of the full sum of 100*l*. at a distant day, have been made good. They have, therefore, enabled the society to obtain a larger monthly payment, that is, 12*s*. instead of 8*s*. 6*d*. on each share, and to reduce on favourable terms the number of shares to be eventually provided for; this is in truth substantially an investment at a high rate of interest, and the benefits thereby accruing may not inaptly be designated, together with the interest on ordinary investments, by the name of profit. What is the precise amount of benefit, which from these different causes may have resulted to the society from the subscriptions of each member, must be a problem very difficult to solve, not perhaps admitting of any absolutely accurate solution; but it may be possible to arrive at it in a rough way, so at least as to enable the directors to fix from time to time a sum which may, without detriment to the interests of the

society, be paid to any member desirous of withdrawing beyond the amount of the principal sums subscribed by him; and the sixteenth rule enables the directors to fix on such a sum, it being not, I think, inaccurately described as a bonus out of the profits of the society. The interests of members, as well those taking their shares by anticipation as those quitting the society, are thus tolerably well provided for.

"But another case was contemplated, namely, that of members who, having received their shares by anticipation, might be desirous of relieving themselves from the burden of continuing the payment of their monthly subscriptions and redemption money. From the very nature of these societies it is impossible to know with certainty how long it may be necessary to continue the monthly payments; they must be made until the sum necessary to give to every unadvanced member the full amount of his share, that is, in this society, 100*l.*, has been accumulated: the time required for this purpose will be more or less, according to the amount of benefit which the society may derive from the discount given on advances of shares and from the interest made by investments, in other words, as the profits realized have been large or small. Reasoning *à priori,* the fair course would seem to be, that the society should ascertain as nearly as may be the period of time during which the monthly payments would have to be continued, and then should allow any advanced member to relieve himself from the obligation of continuing his monthly payments on paying down at once a sum equivalent to their present value. Thus, if the monthly payment is 12*s.*, and it is ascertained that these payments must

CHAP. I. probably continue to be made for ten years, it would seem to be a reasonable arrangement that the advanced member, who is liable to pay 12*s.* per month for ten years, should be freed from his liability on paying down at once a sum which an actuary should say is equivalent in present money to such continued prospective payment. This, however, is not the principle on which the power of redemption is given in this society: the provision on this subject is to be found in the fourteenth rule, it is as follows . . . . . It is impossible to read this rule without being strongly impressed with the belief that those who framed it had not duly considered how it would operate. When an unadvanced member withdraws from the society, it is reasonable, and not necessarily inconsistent with the interest of its remaining members, that he should receive back, not only the principal sums which he has contributed, but also by way of bonus a portion of the benefits which those sums have gained for the society. Up to the time of his withdrawing he has received nothing: when he withdraws he loses all right to the share, that is the 100*l.*, to which, if he had not withdrawn, he would, like every continuing member, have been eventually entitled, and is content to take in lieu of it the amount of what, for a series of years, he has been paying, together with a portion of what has been, as it were, accumulating in respect of those payments towards the eventual realization of his 100*l.* share. This is the position in which a withdrawing member stands at the time of his withdrawal, but the condition of an advanced member redeeming, which is in truth withdrawing, is very different; he is not a member who has up to the

time of his redeeming received nothing; in fact, he has received that which he was content to take, supposing redemption to be out of the question, as an equivalent for the whole of his share. The rule, therefore, which gives to him on redeeming his obligation the same sum under the name of profits as is given to the non-advanced member on withdrawing, appears to be hardly reasonable: still, the question to be decided is, not whether the provision is fair and just, but what is the meaning of the rule: if the meaning is clear, it is the duty of the Court, if possible, to give it effect."

And in *Re Guardian Permanent Benefit Building Society* (*j*), Sir George Jessel, M. R., made the following observations on the same subject:—"The first point to be observed is that, whatever the effect of the Act of Will. 4 may be, it applies to societies already in existence, and it professes to deal with those societies. It is familiar to all who are interested in the subject that at the time of the Act these societies consisted of two classes of members—investing members and borrowing members, sometimes called advanced and unadvanced. The scheme of those societies was this: there were certain persons who had saved or were saving money and were desirous of investing it at a higher rate of interest than the usury laws enabled them to obtain at the time; and other persons who were desirous of either building or buying houses for their own habitation. Those two classes of persons came together;

(*j*) (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134. The decision in this case was ultimately reversed by the House of Lords in *Agnew* v. *Murray*, 9 App. Cas. 519; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462, but the value of this part of the judgment is not thereby impaired.

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the people who had saved money or were saving money paid it into the society, and it was lent to persons who were desirous of building or buying houses on the security of the houses, and on terms which compelled the borrowers to pay a larger sum by way of interest than five per cent. per annum. That this was the substance of those societies must have been known to the legislature. The societies were divided into two classes, those which were called terminable, and which came to an end at the expiration of a fixed period, sometimes of ten years and sometimes of fifteen, and the other class, called permanent societies, which came to an end when the shares were all paid up (*k*). In both cases, at the termination of the society, the profits were realized and the surplus assets were divided amongst the members who had paid up their shares. They got back their money with an addition in the shape of interest, which, though always expected to be more than five per cent., was sometimes a good deal less. Therefore, the investing members got back their money and interest, and the advanced members got their houses on payment off of the mortgages which were given to secure the sums payable on their shares."

Nature of shares in a building society.

It will thus be seen that a "share" in a building society is essentially a different thing from a share in a joint stock company; in a recent Scotch case the two were thus contrasted by the Lord President, Lord Dunedin:—"The general scheme of this class of building society may be described as a method by which persons can make contributions of money, which when

(*k*) Both these classes would now be considered terminating societies.

they arrive at a certain figure are denominated a 'share.' The value of a share is not payable at once, but by instalments. When the value of the share is 'matured'—that being the expression used when the instalments, *plus* the interest and *plus* any bonuses accruing, arrive at the nominal value of the share—the member gets the value standing at his credit. He may interrupt the process at any time by withdrawing the share or instalment, and going away with any money he has contributed, *plus* interest and bonuses. Or, further, he may have impignorated his share to the society for an advance made to him in respect of his house, in which case the society hold the value of his share as it matures, and also have a security over the heritable property upon which the house was built . . . A share in a limited liability company is part of the capital, and is something which cannot be got rid of. It may be transferred to someone else, but it cannot be put out of existence. Comparing it with the so-called shares of this building society, the difference is apparent. A share in this building society represented no proportionate quota of the company's capital. There might be as many shares in this society as people liked to apply for. The share here represented no more than an ear-marked application for a contribution of 25*l*. The share might never come to maturity. It might be withdrawn long before it was matured. It might either be paid back, or it might be wiped out in an advance. Accordingly, though the word is the same, there is nothing more than a faint analogy between it and a share in a joint stock company" (*l*).

(*l*) *Liquidator of Irvine and Fullarton Property Investment*

CHAP. I.

Rules must specify whether society is terminating or permanent.

The rules of all societies established since November 2nd, 1874, and all complete alterations of the rules of societies, whenever established, which are governed by the Building Societies Act of 1874 and the subsequent amending Acts, must specify whether the society is terminating or permanent, though where either of these words forms part of the society's name (as is generally the case with permanent societies), no further statement of the fact is required. But, except as respects the limit of their borrowing powers, and the manner in which they may invest their surplus funds, in the case of incorporated societies (*m*), and the mode of their dissolution, there appears to be no distinction in law between permanent and terminating societies. From the point of view of the lawyer, the important division of building societies, whether terminating or permanent, is the cross-division into incorporated and unincorporated societies, each of these classes being governed, broadly speaking, by a separate and distinct group of Acts of Parliament. This subject will be discussed in the next chapter.

and Building Society v. *Cuthbertson* (1905), 8 F. 1, Ct. of Session; 43 Sc. L. R. 17.

(*m*) Building Societies Act, 1874, ss. 15, 25.

CHAPTER II.

THE DIVISION OF BUILDING SOCIETIES INTO INCORPORATED AND UNINCORPORATED SOCIETIES.

CHAP. II.

Two classes of societies.

So far as they are regulated by statute, building societies, whether permanent or terminating, are divided into two classes—(1) Unincorporated; (2) Incorporated.

Unincorporated societies.

(1) The former class (more properly termed benefit building societies) consists of societies which were originally formed under and continue to be still governed by the Building Societies Act of 1836(*a*), and the two old and long-repealed Friendly Societies Acts of 1829(*b*) and 1834 (*c*), the provisions of which were, by a most clumsy piece of legislation (*d*), extended to building societies so far as they might be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof in the same manner as if expressly re-enacted. The Act of 1836 was repealed by the Building Societies Act, 1874 (*e*), but with a proviso that this repeal should not affect any society in existence on November 2nd, 1874,

(*a*) 6 & 7 Will. 4, c. 32. As to the scope and object of this Act, see the judgment of Jessel, M. R., in *Re Guardian Permanent Benefit Building Society* (1883), 23 Ch. D. 440; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134; and of Lord Blackburn in *Agnew* v. *Murray* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462.

(*b*) 10 Geo. 4, c. 56.

(*c*) 4 & 5 Will. 4, c. 40.

(*d*) 6 & 7 Will. 4, c. 32, s. 4.

(*e*) 37 & 38 Vict. c. 42, s. 7.

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until it obtained a certificate of incorporation under the Act of 1874; and it was repealed absolutely and without any qualification, as from August 25th, 1896, as to all societies certified thereunder after the year 1856 (*f*). The effect of this was to give these latter societies two years' grace in which to obtain certificates of incorporation, and any society which has failed to do this has, it would seem, if consisting of more than twenty members, come within the class of associations forbidden by sect. 1 of the Companies (Consolidation) Act, 1908 (*g*), and must incur all the disabilities incident to that position; see *Re Ilfracombe Permanent Mutual Benefit Building Society* (*h*). The result is that the only unincorporated societies now in existence which have a proper legal constitution are those which were certified between the years 1836 and 1856 inclusive.

The functions and powers which, as regards unincorporated societies, were formerly vested in the barrister appointed to certify the rules of savings banks, and the clerk of the peace, were transferred by the Act of 1874 to the registrar of friendly societies, and are now exercised by the Central Office (*i*); and unincorporated

(*f*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 25 (2).

(*g*) 8 Edw. 7, c. 69, which takes the place of sect. 4 of the Companies Act, 1862.

(*h*) [1901] 1 Ch. 102; 70 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44; 49 W. R. Dig. 18; and see cases cited in note (*e*), p. 24, *infra;* see, however, the Scotch case of *Smith's Trustees* v. *Irvine, &c. Building Society,* cited *infra,* p. 375. In his Report for 1894, p. 50, the registrar expressed the opinion that a society which had failed to obtain incorporation by the appointed time was in much the same position as a society whose registry has been cancelled, as to which see *post,* p. 44.

(*i*) Building Societies Act, 1874, s. 7; Friendly Societies Act, 1896, s. 2; see *post,* p. 28.

societies are also required to make an annual account and statement of their assets and liabilities in the same way as incorporated societies (*j*), though the form of the account is different. Moreover, owing to an error which crept into the Act of 1874, all societies whose rules had been certified under the Act of 1836, were, from November 2nd, 1874, to April 22nd, 1875, *deemed* to be societies under the Act of 1874, although they had not obtained any certificate of incorporation. This arose from an oversight in the wording of sect. 8 of the Act, and the mistake, which is said to have arisen from an accidental transposition of words while the bill was in the House of Lords, was rectified by the Building Societies Act, 1875, which, after repealing sect. 8 of the Act of 1874, provides that any society certified under the Act of 1836 may obtain a certificate of incorporation under the Act of 1874, and thereupon shall be deemed to be a society under that Act, and its rules will, so far as the same are not contrary to any express provisions of that Act, continue in force until altered or rescinded (*k*). No alteration of rules, therefore, is required as a preliminary to incorporation. CHAP. II.

Certificate of incorporation, how obtained.

Any unincorporated society certified between the years 1836 and 1856 can obtain a certificate of incorporation under the above section. The application must be made by a person authorized by a general meeting of the society specially called for the purpose. It must

(*j*) Building Societies Act, 1894, s. 25, sub-s. 1.

(*k*) See Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 8; Building Societies Act, 1875 (38 Vict. c. 9), ss. 1, 2; *Re Guardian Permanent Benefit Building Society* (1882), 23 Ch. D. 440, 445; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134; *Agnew* v. *Murray, Brimelow* v. *Murray* (1884), 9 App. Cas. 519, 525; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462.

CHAP. II.

be made in the Form A. prescribed by the Building Society Regulations, 1895, and must be accompanied by (a) a copy of the rules of the society as they exist at the date of the application, and (b) a statutory declaration by the applicant in the prescribed Form B. If the registrar at the time the application is received by him has not received from the clerk of the peace for the county in which the society is established a transcript of the certified and enrolled rules of the society, he must make application to the clerk of the peace for the same, and if the same is not received by him within seven days of such application, he must, as soon as practicable, acquaint the applicant for incorporation therewith, who must furnish evidence that the rules are certified as provided by the Building Societies Act, 1874, s. 11, before the society can be incorporated (*l*). On these formalities being complied with, a certificate of incorporation is granted by the registrar, and the society thereupon becomes a body corporate by its registered name, having perpetual succession until terminated or dissolved, and a common seal (*m*).

Vesting of property on incorporation.

All rights of action and other rights, and all estates and interests in real and personal estate belonging to or held in trust for the society, vest in it, on its incorporation, without any conveyance or assignment, except in the case of stocks and securities in the public funds of Great Britain and Ireland, and estates in copyhold or customary hereditaments the title to which cannot be transferred without admittance (*n*).

(*l*) Building Societies Act, 1874, ss. 10, 11, 12; Building Society Regulations, 1895, r. 1.
(*m*) Building Societies Act, 1874, s. 9.
(*n*) Building Societies Act, 1874, s. 27; Building Societies Act,

Form of certificate.

The form of a certificate of incorporation is given in the Third Schedule to the Act of 1894 (*o*); see *post*, p. 41.

Fee.

A fee of five pounds is payable for the certificate (*p*).

There seems no objection in point of law to a society obtaining a certificate of incorporation for the mere purpose of being wound up (*q*).

Court cannot declare certificate void for irregularity.

When once the registrar has given his certificate of incorporation, the Court has no power to declare it void on the ground that it was irregularly obtained: see *Glover* v. *Giles* (*r*). In that case (in which the society was not a party to the action) Mr. Justice Fry, in delivering judgment, said:—

Glover v. *Giles*.

"It appears to me clear that before the certificate was granted by the registrar it was his duty to satisfy himself whether the application was made by authority

1877, ss. 3, 4. Sect. 27, as originally framed, contained the word "now" before the words "belonging to or held in trust for." This was soon found to require amendment, which was effected by sects. 3 and 4 of the Act of 1877. The effect of the three sections taken together appears to be this:—In the case of a society under the old law which obtained a certificate of incorporation in the interval between November 2nd, 1874, and August 14th, 1877, so much only of the property of the society vested in it on its incorporation as belonged to or was held in trust for the society on November 2nd, 1874 (sect. 27); but all property held in trust for such a society on August 14th, 1877, vested in the society on that date (sect. 4). In the case of any society under the old law obtaining a certificate of incorporation since August 14th, 1877, the property belonging to or held in trust for it vests in the society immediately on its incorporation (sects. 3, 27).

(*o*) Building Societies Act, 1894, s. 26.

(*p*) Building Society Regulations, 1895, r. 41, as altered.

(*q*) *Fountain's Case* (1865), 4 De G. J. & S. 699; 34 L. J. Ch. 593; 11 Jur. N. S. 553; 13 W. R. 667; 12 L. T. 335; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. p. 371; 63 L. J. Ch. 506; 42 W. R. 535; 70 L. T. 796, *per* Wright, J.

(*r*) (1881), 18 Ch. D. 173; 50 L. J. Ch. 568; 29 W. R. 603; 45 L. T. 344.

CHAP. II. of a general meeting of the society specially called for the purpose, and he was at liberty to require the person making the application to verify that authority by a statutory declaration, and, upon this being done, and the certificate being granted according to the terms of the Act, the society became incorporated. Now it is said I can declare that incorporation to be void, on the ground that no proper meeting was held, and it is said that the meeting which was held on the 10th of April, 1879, was not a proper meeting within the meaning of the 12th section of the Act, because it was not summoned in compliance with certain rules of the society with regard to the summoning of general meetings. In my view, I have no power to inquire into that at all, and I cannot declare the incorporation to be void. The incorporation of persons into bodies corporate is a prerogative of the Crown, and although in this case the prerogative is exercised under certain statutory provisions, the incorporation is none the less an exercise of the prerogative. There is a perfectly well-known method by which an incorporation may be recalled or made void. Moreover, it is competent to proceed by *quo warranto*, and to show that persons who represent themselves as members or officers of a corporation are not so. But it is quite new to me to hear that some of the individual corporators of a corporation can come to this Court and ask to have it declared, as against other members of the corporation, that the incorporation was obtained by fraud or irregularity. And there is in this case, as it appears to me, this further fatal objection, that the declaration that the incorporation is void is sought for in the absence of the corporation itself,

which is not made a defendant to this action. I am in effect asked to declare an incorporation void in the absence of the corporation itself, a step which in common fairness it is impossible for me to take."

Cancellation of certificate by registrar.

Under certain circumstances, however, and amongst others where a certificate of incorporation has been obtained by fraud or mistake, the registrar has power to cancel or suspend the registry of the society; see *post*, p. 41. It would seem that this power applies to societies formed under the Act of 1836 and afterwards incorporated as well as to societies established in the first instance under the Act of 1874.

Unincorporated societies a diminishing class.

It will be obvious, from what has been said above, that the class of unincorporated societies can never be added to and is diminishing in number (1) by effluxion of time in the case of terminating societies; (2) in any case by winding-up; (3) by the society becoming incorporated under the Act of 1874; (4) by the repeal of the Act of 1836 as to all societies certified thereunder after 1856, which, as above mentioned, took effect on August 25th, 1896; and that the whole class will eventually become extinct.

Scotland, Wales and Ireland.

There are no unincorporated societies in Scotland, Wales, or Ireland.

Incorporated societies.

(2) The second class consists of societies regulated by the Building Societies Acts of 1874, 1875, 1877, 1884, and 1894, and the Regulations issued under sect. 44 of the first-named Act by the Secretary of State.

They are either—

(a) Societies established since November 2nd, 1874,

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the date on which the Act of 1874 came into operation; or

(b) Societies established previously thereto under the Act of 1836, but which have obtained certificates of incorporation under the Act of 1874.

When once incorporated, a society originally established under the Act of 1836 differs but very slightly from a society established in the first instance under the Act of 1874. The chief difference is in the mode of altering the rules which, in the case of a society originally established under the old law, can only be altered or rescinded, or an additional rule made, by the vote of three-fourths of the members present at a special meeting called for the purpose, of which meeting notice specifying the proposed alteration, rescission, or addition, must be given to the members in the manner provided by the rules, or, in the absence of such rules, by letters sent through the post seven days previous to the meeting (*s*). A society established under the Act of 1874, on the other hand, may alter its rules in any manner its rules direct (*t*). It is not absolutely necessary to alter the rules of an old society on incorporation, but it is always advisable to do so, as the mere fact of incorporation requires conditions (such as the use of the seal) which are inconsistent with the legal position of an unincorporated body, and much practical inconvenience, it is said, has been experienced in some cases by societies which have stopped short at mere incorporation without altering their rules.

Name.

A society certified under the Act of 1836 retains its

(*s*) Building Societies Act, 1874, s. 18.
(*t*) *Ibid.*

name on incorporation, although in form it would be inadmissible under the Act of 1874 (*u*). But if it should subsequently desire to change its name it must comply with the provisions in this respect of the latter Act and the Regulations, as to which see *infra*, p. 67.

Scotland and Ireland.

The Building Societies Acts apply to Scotland and Ireland (*x*), with the exception of sect. 13 of the Act of 1894, forbidding advances on second mortgage, which does not apply to any society in Scotland or Ireland which at the passing of the Act (August 25th, 1894) was authorized by its rules to make advances upon second mortgage (*y*). In the application of the Act of 1874 to Scotland, "freehold estate" means "heritable estate," "mortgage" means "conveyance or bond and disposition in security," "letters of administration" means "confirmation," and "the Court" means the Sheriff's Court of the county in which the chief office or place of meeting for the business of the society is situate (*z*).

In Ireland, "the Court" means the Civil Bill Court within the jurisdiction of which the office or place of meeting is situate (*a*).

As to the assistant registrars for Scotland and Ireland respectively, see *post*, p. 28.

Secretary of State's Regulations.

One of his Majesty's Principal Secretaries of State may from time to time make Regulations respecting the fees, if any, to be paid for the transmission, regis-

(*u*) *Ibid.* s. 9.
(*x*) *Ibid.* ss. 4, 6.
(*y*) Building Societies Act, 1894, s. 13. As to such advances, see *infra*, p. 61.
(*z*) Building Societies Act, 1874, ss. 4, 6.
(*a*) *Ibid.* s. 4.

CHAP. II.

tration, and inspection of documents under the Act of 1874, and generally for carrying the Act into effect (*b*). Regulations were issued in January, 1895, under the authority of this provision; they were amended in 1906.

Secretary for Scotland Act, 1887.

By sect. 2 of the Secretary for Scotland Act, 1887 (*c*), all powers and duties vested in and imposed on one of his Majesty's Principal Secretaries of State by any Act of Parliament, so far as such powers and duties relate to Scotland, were transferred to the Secretary for Scotland. There seems no doubt that this includes the power of making Regulations under the Building Societies Act, 1874.

Channel Islands and Isle of Man.

The Building Societies Acts do not extend to the Channel Islands or the Isle of Man.

Unregistered societies.

There is a third class of building societies, which should perhaps be mentioned, consisting of such as have not taken the precaution of registering under any of the Acts relating to building societies, and are therefore subject only to the general law. There appears to be no objection at common law to the formation of an ordinary building society (*d*). But such a society, if consisting of more than twenty members, would, it is conceived, be rendered illegal by sect. 1 of the Companies (Consolidation) Act, 1908, unless registered under that Act, as being an association having for its object the acquisition of gain (*e*). A freehold land

(*b*) Building Societies Act, 1874, s. 44.

(*c*) 50 & 51 Vict. c. 52.

(*d*) *Murray* v. *Scott* (1884), 9 App. Cas. p. 546; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462, *per* Lord Blackburn.

(*e*) *Shaw* v. *Benson* (1883), 11 Q. B. D. 563; 52 L. J. Q. B. 575; 49 L. T. 651; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225; 51 L. J. Q. B. 493; 31 W. R. 40; *Shaw* v. *Simmons* (1883), 12

society, however, is not within the mischief of this section (*f*). As to the position of a society which, having been registered under the Act of 1836 subsequently to 1856, has failed to obtain a certificate of incorporation, see *ante*, p. 16.

Joint stock companies.

Lastly, the business of a building society may be carried on by an ordinary joint stock company, formed and registered under the Companies Acts; but in that case, of course, the society is governed exclusively by those statutes, and not by the Acts relating to building societies.

In the case of an unlimited company formed to carry on the business of a building society, there is no objection, it seems, to the members having the usual right of withdrawal, provided there is an express provision to that effect in the memorandum or articles (*g*).

Dominion building societies.

Building societies on the English model have been established in several of the Dominions, but the rights and liabilities of such societies and their members depend for the most part on the local law of the particular place. In many cases, however, the language of the local Acts follows very closely that of the English Building Society Acts, and the English decisions are

Q. B. D. 117; 53 L. J. Q. B. 29; 32 W. R. 292; *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379; 54 L. J. Q. B. 336; 33 W. R. 583; 51 L. T. 602; and see *post*, p. 375. A member of such an association might, however, be convicted under the Larceny Act, 1916, ss. 1, 40 (4), of embezzling its property; see *R.* v. *Tankard*, [1894] 1 Q. B. 548; 63 L. J. M. C. 61; 42 W. R. 350; 70 L. T. 42; 58 J. P. 300; 10 R. 149; 17 Cox, C. C. 719.

(*f*) *Re Siddall* (1885), 29 Ch. D. 1; 54 L. J. Ch. 62; 33 W. R. 509; 52 L. T. 114; *Crowther* v. *Thorley* (1884), 32 W. R. 330; 50 L. T. 43; 48 J. P. 292; reversing the decision below, 31 W. R. 564; 48 L. T. 644; *Wigfield* v. *Potter* (1881), 45 L. T. 612.

(*g*) *Re Borough Commercial and Building Society*, [1893] 2 Ch. 242; 62 L. J. Ch. 456; 41 W. R. 313; 69 L. T. 96; 3 R. 339.

CHAP. II. therefore often cited and followed. The position of a building society established at the Cape of Good Hope, where there is no statutory enactment on the subject, and the rights and liabilities of the members of such a society in a winding-up, will be found discussed in *Re Cape of Good Hope Permanent Building Society* (*h*) and *Liquidators of Cape of Good Hope Land Building and Investment Society* v. *Standard Bank* (*i*). Extracts from the Reports of the Registrars of Friendly Societies in the Australian States and Canada, and from the Statistical Abstracts of Natal, New Zealand, and the United States of America, which contain information of much interest to those connected with building societies in this country, are given in Appendix C., p. 17, to the Chief Registrar's Report for the year 1908.

America. As to building societies or associations in America, see *Robertson* v. *Homestead Association*, 69 Amer. Decns., p. 150; American and English Encyclopedia of Law, vol. 4, p. 999.

(*h*) (1898), 15 S. C. R. 323.
(*i*) (1899), 16 S. C. R. 325.

CHAPTER III.

THE REGISTRAR.

Chap. III.

Position of registrar.

Many important duties in connection with building societies are assigned by the Building Societies Acts to the registrar, of whom mention has already been made, and it will be convenient, therefore, before proceeding further, to give a brief account of his position.

Under the Act of 1836, and the old Friendly Societies Acts incorporated with it, the rules and alterations of rules of benefit building societies were submitted, in England, to the barrister appointed to certify the rules of savings banks (*a*), who, however, was always the same person as the registrar of friendly societies. When these Acts were repealed by the Building Societies Act, 1874, it was provided that, with regard to such subsisting societies as should not obtain certificates of incorporation under that Act, all things required to be done by or sent to the barrister or advocate and clerk of the peace should for the future be done by or sent to the registrar (*b*).

Definition of registrar.

The Act further provided that, except where otherwise expressed, "the registrar" should mean the registrar for the time being of friendly societies in England, Scotland, or Ireland, as the case might be,

(*a*) 4 & 5 Will. 4, c. 40, s. 4.
(*b*) Building Societies Act, 1874, s. 7.

CHAP. III. who should, for the purposes of the Act, be the registrar of building societies (*c*).

In 1875 a further alteration was made by the Friendly Societies Act of that year (*d*), which established the office of chief registrar of friendly societies, with one or more assistant registrars for England, and provided that such chief registrar and assistant registrars for England should constitute the "Central Office," to which were assigned all the functions and powers formerly vested in the registrar of building societies for England or in the barrister appointed to certify the rules of savings banks; and the same Act also established assistant registrars for Scotland and Ireland to discharge the duties of registrar in those countries. In 1896 this Act was repealed, but substantially re-enacted by the Friendly Societies Act, 1896 (*e*), the material provisions of which are as follows:—

"*The Registry Office.*

The registry office.

"1.—(1.) There shall continue to be a chief registrar of friendly societies (in this Act called 'the chief registrar'), and one or more assistant registrars of friendly societies for England (in this Act called 'assistant registrars for England'), and the chief registrar and assistant registrars for England shall continue to constitute the central office of the registry of friendly societies.

"(2.) There shall continue to be an assistant registrar of friendly societies for Scotland (in this Act called

(*c*) Building Societies Act, 1874, s. 3.
(*d*) 38 & 39 Vict. c. 60.
(*e*) 59 & 60 Vict. c. 25.

'assistant registrar for Scotland'), and an assistant registrar of friendly societies for Ireland (in this Act called 'assistant registrar for Ireland'). CHAP. III

"(3.) Every chief registrar and assistant registrar shall be appointed by and shall hold his office during the pleasure of the Treasury.

"(4.) The chief registrar shall be a barrister of not less than twelve years standing, and one at least of the assistant registrars for England, and the assistant registrar for Ireland, shall be a barrister or solicitor of not less than seven years standing, and the assistant registrar for Scotland shall be an advocate, writer to the signet, or solicitor of not less than seven years standing.

"(5.) The central office may, with the approval of the Treasury, have attached to it such assistants skilled in the business of an actuary and an accountant as may be required for discharging the duties imposed on the office by this Act."

"2.—(1.) The central office shall continue to exercise the functions and powers formerly vested— Functions of the central office.

* * * * *

"(b) as respects building societies, in the registrar of building societies in England; and

"(c) as respects unincorporated benefit building societies, ... in the barristers appointed to certify the rules of savings banks or friendly societies,

and shall be entitled to receive all fees payable to those registrars and barristers; and all enactments relating to those registrars and barristers shall, so far as respects

CHAP. III. . . . such societies as aforesaid, be construed as applying to the central office."

* * * * *

Functions of assistant registrars generally.

"3.—(1.) The assistant registrars shall, except as in this Act provided, be subordinate to the chief registrar.

"(2.) They shall, within the parts of the United Kingdom for which they are respectively appointed, exercise all functions and powers by this Act given to the registrar, and may also by the written authority of the chief registrar, exercise such of the functions and powers by this Act given to the chief registrar as he may delegate to them."

Functions of assistant registrars for Scotland and Ireland.

"4.—(1.) Subject to any regulations to be made under this Act, the assistant registrars for Scotland and Ireland respectively shall continue to exercise the functions and powers formerly vested—

* * * * *

"(b) as respects building societies, in the registrars of building societies in Scotland and Ireland; and

"(c) as respects benefit building societies . . . .in Scotland, in the Lord Advocate or his deputes appointed to certify the rules of any such societies, and, in Ireland, in any barristers appointed for the like purpose;

and shall be entitled to receive all fees payable to those registrars, the Lord Advocate or his deputes, and those barristers respectively; and all provisions in any Acts of Parliament relating to those persons respectively shall be construed as applying to those assistant registrars.

"(2.) Subject as aforesaid, the assistant registrars for Scotland and Ireland shall—

"(a) send to the central office copies of all such documents registered or recorded by them as the chief registrar may direct; and

"(b) record such documents and matters as may be sent to them for record from the central office, and such other documents and matters as are in this Act required to be recorded; and

"(c) circulate and publish, or transmit to or from societies registered in Scotland or Ireland respectively, from or to the central office, such information and documents relating to the purposes of this Act as the chief registrar may, with the approval of the Treasury, direct; and

"(d) report their proceedings to the chief registrar as he may direct.

"(3.) An assistant registrar for Scotland or Ireland shall not refuse to record any rules or amendments of rules which have been registered by the central office."

Salaries and expenses.

"5. The Treasury shall, out of money to be provided by Parliament, pay to the chief and assistant registrars such salaries or other remunerations, and such sums of money for defraying the expenses of office rent, salaries of assistants, clerks, and servants, remuneration for actuaries, accountants, and inspectors, computation of tables, publication of documents, diffusion of information, expenses of prosecutions, travelling expenses and other allowances of the chief or any assistant registrar, and other expenses which may be incurred for carrying

CHAP. III. out the purposes of this Act, as the Treasury may allow."

Report of the chief registrar.

"6. The chief registrar shall every year make a report of his proceedings and of those of the assistant registrars, and of the principal matters transacted by him and them and of the valuations returned to or caused to be made by the registrar during the year preceding, and that report shall be laid before Parliament."

Central Office.

The registrar of building societies for England is therefore the Central Office consisting of the chief registrar of friendly societies and (at present) one assistant registrar, either or both of whom may do any act required to be done by the registrar.

Scotland and Ireland.

In Scotland and Ireland the duties of registrar are discharged by the assistant registrars for those countries. All the assistant registrars are subordinate to the chief registrar.

Special powers of chief registrar.

There are two special powers vested in the chief registrar: (1) He prescribes the form of the annual account and statement which has to be made by every society (*f*); (2) he makes an abstract and report of these annual accounts and statements, and of the proceedings of the registrars under the Building Societies Acts, and lays the same before the Secretary of State and before Parliament (*g*).

Official address.

The official address of the registrar is: for England, Dean Stanley Street, Westminster, London, S.W.; for Scotland, 3A, Howe Street, Edinburgh; for Ireland, 12, South Frederick Street, Dublin. The registrars have privilege of postage, and

(*f*) Building Societies Act, 1874, s. 40; Building Societies Act, 1894, ss. 2, 25.

(*g*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 27.

therefore no communication to them on official business and marked "On His Majesty's Service," requires to be stamped.

Evidence.

Any certificate of incorporation or of registration, or other document relating to a society under the Building Societies Acts, purporting to be signed by the registrar, will, in the absence of any evidence to the contrary, be received by all courts of law and equity, and elsewhere, without proof of the signature (*h*); and by the Friendly Societies Act, 1896, s. 100, every document bearing the seal or stamp of the central office will be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector, or public auditor or valuer under the Act, will, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

Under the Secretary of State's Regulations, every document under the Building Societies Acts bearing the seal of the central office for registry of friendly societies, or the signature of the assistant registrar of friendly societies for Scotland or Ireland, as the case may require, is to be deemed duly authenticated for the purposes of the Acts and Regulations (*i*). In practice documents for England and Wales are usually authenticated by the seal of the central office, and not by the signature of the registrar.

Forms in the Regulations may be dispensed

Where a document is tendered for registry which appears to the registrar substantially to comply with the provisions of the Building Societies Acts, he may

(*h*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 20.
(*i*) Building Society Regulations, 1895, r. 43.

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with or modified by registrar.

dispense with the use of any of the forms prescribed by the Regulations; but nothing in this Regulation contained is to hinder the registrar from refusing to register a document not in the prescribed form when it shall appear to him to be unnecessarily long, or to contain extraneous matter (*j*).

The registrar may also modify any such forms to suit particular cases, and may dispense with the obligation to supply a duplicate of any document where such obligation is imposed only by the Regulations (*k*). He may also dispense with the fee for inspection of documents in cases where he may consider it for the public interest to do so, and may, in exceptional cases, reduce the fee for an award (*l*).

Unincorporated societies.

The registrar is much more concerned with incorporated than with unincorporated societies, and his connection with the latter is limited to the following matters:—

Amendment (termed alterations) of rules.
Removals of the place of meeting.
The bonds of treasurers and officers.
The reception of the annual statement.
Incorporation under the Building Societies Act, 1874, and the Regulations.

(*j*) Building Society Regulations, r. 44.
(*k*) *Ibid.* r. 45.
(*l*) *Ibid.* r. 42, as altered.

CHAPTER IV.

THE FORMATION OF A BUILDING SOCIETY.

Formation of society.

ANY number of persons, not being less than three (*a*), may establish a building society, either terminating or permanent, under the Act of 1874 (*b*). The persons intending to establish the society must make an application to the registrar, in the Form C. prescribed by the Regulations, for a certificate of incorporation. The application must be signed by three members and the secretary, and must be accompanied by two printed copies of the rules agreed upon for the government of the society, each copy being marked P., and signed (*c*) by each of the applicants (*d*).

Fee.

A fee of five pounds is payable for a certificate of incorporation, and must be sent with the application (*e*).

Matters to be set forth in the rules.

The rules must set forth—

1. The name of the society, and chief office or place of meeting for its business:
2. The manner in which the stock or funds of the society is or are to be raised:
3. The terms upon which unadvanced subscription

(*a*) Building Societies Act, 1874, s. 17.
(*b*) *Ibid.* s. 13.
(*c*) *Cf. Ho Tung* v. *Man On Insurance Co.*, [1902] A. C. 232; 71 L. J. P. C. 46; 85 L. T. 617; 9 Manson, 171.
(*d*) Building Societies Act, 1874, s. 17; Building Society Regulations, 1895, r. 2, and Form C. annexed thereto.
(*e*) Regulations, r. 41, as altered.

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shares are to be issued; the manner in which the contributions are to be paid to the society, and withdrawn by the members, with tables, where applicable, showing the amount due by the society for principal and interest separately:

4. The terms upon which paid-up shares, if any, are to be issued and withdrawn, with tables, where applicable, showing the amount due by the society for principal and interest separately:
5. Whether preferential shares are to be issued, and, if so, within what limits:
6. The manner in which advances are to be made (not being by ballot or dependent on any chance or lot and not being on second mortgage) and repaid; the deductions, if any, for premiums, and the conditions upon which a borrower can redeem the amount due from him before the expiration of the period for which the advance was made, with tables, where applicable, showing the amount due from the borrower after each stipulated payment:
7. The manner in which losses are to be ascertained and provided for:
8. The manner in which membership is to cease:
9. Whether the society intends to borrow money, and, if so, within what limits not exceeding those prescribed by the Building Societies Acts, and not including in such limits mortgages twelve months in arrear or properties twelve months in possession, nor allowing of deposits except upon condition of one month's notice:
10. The purposes to which the funds of the society

are to be applied, and the manner in which they are to be invested:

11. The manner of altering and rescinding the rules of the society, and of making additional rules:
12. The manner of appointing, remunerating, and removing the board of directors or committee of management, auditors, and other officers:
13. The manner of calling general and special meetings of the members:
14. Provision for an annual or more frequent audit of the accounts and inspection by the auditors of the mortgages and other securities belonging to the society:
15. Whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the County Court, or to the registrar, or to arbitration:
16. Provision for the device, custody, and use of the seal of the society, which shall in all cases bear the registered name thereof:
17. Provision for the custody of the mortgage deeds and other securities belonging to the society:
18. The powers and duties of the board of directors or committee of management and other officers:
19. The fines and forfeitures to be imposed on members of the society:
20. The manner in which the society shall be terminated or dissolved, and whether it is terminating or permanent (*f*).

(*f*) Building Societies Act, 1874, s. 16; Building Societies Act, 1894, ss. 1, 28; Regulations, r. 2, and Form C. therein referred to.

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Rules may be made to provide forms of conveyance, &c.

The society, in a schedule to its rules, may describe the forms of conveyance, mortgage, transfer, agreement, bond, security for deposit or loan, or other instrument necessary for carrying its purposes into execution (*g*).

Statutory forms.

Forms of the bond to be given by the officers of the society under sect. 23, and of the statutory receipt under sect. 42, are given in the Schedule to the Act of 1874. Forms of various certificates to be given by the registrar are contained in the Third Schedule to the Act of 1894, and various other forms are appended to the Building Society Regulations, 1895.

Practice of the registrar as to registration of rules on certain points.

In framing rules for a proposed society, the following observations contained in the Guide Book of the Registry of Friendly Societies should be borne in mind:—

Leasing powers.

Prior to the Conveyancing Act, 1881 (*h*), the registrar did not feel justified in registering rules providing for the granting of leases by building societies as mortgagees. Since that Act came into operation, however, rules are admitted to registry which allow building societies, as mortgagees in possession, to grant such leases as are authorized by sect. 18, sub-sects. 3 and following, of the Act in question, viz.:—(1) agricultural or occupation leases for a term not exceeding twenty-one years; and (2) building leases for a term not exceeding ninety-nine years, the term "building lease," by definition x. in sect. 2, including the erecting and improving of, and adding to, and repairing of buildings. But the Conveyancing Acts give no power of leasing to mortgagees not in possession, and rules

(*g*) Building Societies Act, 1874, s. 19.
(*h*) 44 & 45 Vict. c. 41.

for the purpose will not be registered in the case of a building society. Nor do rules authorizing the society itself to manage the property or execute improvements appear to be within the powers of a mortgagee under the Conveyancing Acts, or consequently within the scope of the Building Societies Acts.

Management of property.

The purposes to which the funds of the society are to be applied, and which must be stated in the rules, cannot extend beyond those specified in the Building Societies Act, 1874. No rules will therefore be registered for enabling the society to carry on any other kind of business, such as banking or fire insurance; or for enabling advances to be made to non-members, except by way of investment of surplus funds; or for the acquisition of land generally, or for its permanent possession by the society.

Purposes of society.

The terms upon which shares may be withdrawn must be *bonâ fide* ones. A rule absolutely forbidding withdrawal would not be registered, nor a merely colourable provision for the purpose. But in terminable societies, especially those which lend money without interest, the right of withdrawal may be withheld for the first few years of the society's existence.

Withdrawal.

The terms upon which mortgages may be redeemed must also be *bonâ fide* and definite. Thus, the terms cannot be left to the discretion of the directors, and if any loss is to be borne by the member through exercising the right to redeem the maximum limit of such loss must be fixed.

Redemption.

The rules as to meetings should specify who are to have the right to call meetings, and on what requisitions, if any, and on what notice they are to be called.

Meetings.

CHAP. IV. Some distinction must also be made between general and special meetings.

Settlement of disputes. No provision for the determination of the disputes of a building society under the Act by a general meeting, or by the board of directors, will be registered. But the registrar would not, it is believed, object to a rule requiring all disputes to be considered in the first instance by the board of directors, acting as a kind of court of conciliation, with the object of bringing the parties to terms.

Fines. The fines fixed by the rules must either be specific, or at least must fix a maximum. A rule fixing a minimum fine only will not be registered.

Preferential shares. The requirement that a limit should be fixed to the issue of preferential shares first appeared in the Act of 1894, but it will be observed that no limit of amount is prescribed, as in the case of the borrowing of money; any society may therefore fix its limit as high as it pleases. The issue of preferential shares was, it seems, an expedient adopted when it was thought that societies had no legal power to borrow, and some doubt was cast upon the legality of it by an opinion given by Sir Roundell Palmer in 1869 (*i*). Where preferential shares are not to be issued a distinct provision to this effect should be inserted in the rules.

Registration and incorporation. If the registrar find that the rules contain all the requisite provisions and that they are in conformity with law, he returns one copy of the rules to the secretary or other officer of the society, with a certificate of

(*i*) See *Building Societies*, by Sir Edward Brabrook, C.B. (1906), p. 75.

incorporation, and retains and registers the other copy (*j*). Upon receipt of the certificate, the society becomes a body corporate by its registered name, having perpetual succession until terminated or dissolved, and a common seal (*k*).

Certificate.

The certificate is in the following form (*l*):—

Form of certificate of incorporation.

No. .

The registrar of building societies in England [Scotland *or* Ireland] hereby certifies that the Building Society, established at , in the county of , is incorporated under the Building Societies Act, 1874, this day of , one thousand nine hundred and .

The incorporation of a building society does not imply any approval by the registrar of its rules or tables, or any guarantee of its good management or financial stability.

[*Seal of Central Office, or signature of Assistant Registrar of Friendly Societies.*]

Cancelling or suspension of registry by registrar.

Where the registrar is satisfied—

(1) That a certificate of incorporation has been obtained for a society under the Building Societies Acts by fraud or mistake; or

(2) That any such society

(a) exists for an illegal purpose (*m*); or

(b) has wilfully and after notice from the registrar violated any of the provisions of the Building Societies Acts; or

(c) has ceased to exist,

(*j*) Building Societies Act, 1874, s. 17.

(*k*) *Ibid.* s. 9; and see *Glover* v. *Giles*, cited *ante*, p. 19, where it was held that the Court had no power to declare a certificate void on the ground that it had been irregularly obtained.

(*l*) Building Societies Act, 1894, s. 26.

(*m*) See *Re Middle Age Pension Friendly Society*, cited *infra*, p. 46.

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he may, by writing under his hand, with the approval of the Secretary of State, cancel the registry of the society, or suspend the registry thereof for any term not exceeding three months, and may, with the like approval, renew such suspension from time to time for the like period (*n*).

Notice must be given to society.

The registrar must, however, before cancelling or suspending the registry of a society under the foregoing powers give to the society not less than two months' previous notice in writing, specifying briefly the ground of the proposed cancelling or suspension; and he must also, as soon as practicable after the cancelling or suspension takes place, cause notice thereof to be published in the Gazette, and in some newspaper circulating in the county in which the registered chief office or place of meeting of the society is situate (*o*).

Appeal by society.

A society may appeal from the cancelling of its registry, or from any suspension thereof for a term exceeding six months, to the High Court in England or Ireland or to the Court of Session in Scotland, and thereupon the Court may, if it thinks it just so to do, set aside the cancelling or suspension (*p*).

Cancellation at request of society.

The registrar may also, if he thinks fit, at the request of any society under the Building Societies Acts, evidenced in such manner as he may direct, cancel the registry of the society (*q*).

Effect of cancellation or suspension.

A society whose registry has been cancelled or suspended will from the time of such cancelling or suspen-

(*n*) Building Societies Act, 1894, s. 6, sub-s. 1.
(*o*) *Ibid.* sub-s. 2.
(*p*) *Ibid.* sub-s. 3.
(*q*) *Ibid.* sub-s. 4.

sion (but in case of suspension only while the suspension lasts, and in any case subject to the above right of appeal) absolutely cease to enjoy as such the privileges of a society under the Building Societies Acts, but without prejudice to any liability actually incurred by the society, and any such liability may be enforced against the society as if the cancelling or suspension had not taken place (*r*).

Every request to cancel registry must be sent to the registrar in Form G., prescribed by the Building Society Regulations, and must name some newspaper circulating in or about the locality in which the registered office of the society is situated, wherein it is desired that the cancelling of registry shall be published, and must be accompanied by the sum requisite to defray the expense of such publication, and by the further sum requisite for publication of such cancelling in the Gazette (*s*).

Application to cancel registry.

Where application is made to cancel registry under the compulsory powers of the registrar, the registrar may require such application to be made in duplicate in such form and to be supported by such statutory declaration as the chief registrar may direct, and must transmit one copy of such application to the Secretary of State for his consent (*t*).

Forms.

The notice before cancelling or suspension of registry, the cancelling of registry, the suspension or renewal of suspension of registry, and the advertisement of can-

(*r*) *Ibid.* sub-s. 5.
(*s*) Building Society Regulations, 1895, r. 8.
(*t*) *Ibid.* r. 9.

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celling or suspension must respectively be in the forms H, I, K, and L, given in the Regulations (*u*).

Power to cancel registry.

The power thus given to cancel or suspend the registry of a building society is new; the section appears to have been copied with slight alteration from the corresponding provision of the Industrial and Provident Societies Act, 1893 (*v*), which was itself in substance only a reproduction of an earlier enactment to the same effect now repealed (*w*).

It is obvious that it arms the registrar with a very formidable weapon, and one which, it may be assumed, he will only use in cases of real necessity.

Effect of cancellation or suspension.

The effect of cancelling or suspending the registry would seem to be to reduce the society to the position of an illegal partnership without any limitation of liability; though the corporate body, so far as its liabilities are concerned, would continue to exist and might be sued accordingly. In his Report for the year 1894, pp. 48—50, the chief registrar made the following remarks as to the effect of suspension and cancellation of registry:—

"By suspension of registry," he says, "a society will, while the suspension lasts, cease to be a body corporate entitled to hold property or to sue in its corporate name, with the liability of its members limited to the amount paid or in arrear on the shares they hold in the society. It will become a mere partnership of persons liable individually for its debts without limitation, and under the great disadvantage that, if it consists of more than twenty members, it will, under the provisions of the

(*u*) Building Society Regulations, 1895, rr. 10—12.
(*v*) 56 & 57 Vict. c. 39, s. 9.
(*w*) Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 8.

Companies Act, 1862, be an illegal body; so that it will not be entitled to ask, for the purpose of carrying on its business, for any assistance from the courts of law, such as they formerly gave to large partnerships. As every partner will have the right to withdraw immediately from a partnership which has ceased to fulfil the fundamental condition of protecting him from liability for its debts, it follows that the members might practically rob the society with impunity, for if any member who was not paid off on demand should seize any of the property of the society, in all of which he would be part owner, as a guarantee for the sum due to him, he could not be convicted for stealing this property. The question would be one of account, which any magistrate before whom the matter was brought on summons, say by any past officer of the society, must dismiss as soon as he understood the nature of the case. There would really, except as hereinafter stated, be no present officers; since the rules of building societies are never so executed as to make them binding on the members without the operation of the Building Societies Acts, which will be suspended; so that the society would be a partnership of the most unmanageable description possible; a partnership without any articles of association defining the rights of the members among themselves. The exception to this state of confusion will be that of a proceeding to enforce against the society a liability actually incurred at the time when the suspension begins, for which purpose the Act of 1894 maintains the corporate character of the society and therefore must keep up the machinery necessary for working it. With this exception, through the combined effect of the want of statutory authority caused by the suspension of registry, and the absence of any authority in the rules of themselves to bind the members otherwise than through the Acts, the society will be destitute of any governing body. All special privileges, *e.g.*, the exemption from stamp duty; the right to administer the property of members without letters of administration; the right to discharge mortgages by an endorsed receipt; with all other minor privileges, will necessarily cease. There will cease also all the facilities given by the Acts to societies for union and transfer of engagements, dissolution by instrument, dissolution by award, and voluntary winding-up, leaving only the power of the Superior Court to dissolve the

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society compulsorily as an unregistered company under sect. 199 of the Companies Act, 1862. The removal or termination of the suspension, while it would restore matters in the future to their normal state, would not undo the consequences of the suspension during the time it had lasted. If the society had managed to carry on its business during that period, care would be required to pass resolutions adopting and ratifying the acts done, while in some cases, for instance, in the exemption from stamp duty, it would not be in the power of the society to alter the action of the law. If the registration were cancelled, there would be added to all the inconveniences before mentioned, the final one that the society will come to an end without any distribution of its property having been made, and that the only ways of getting this property legally distributed would be a deed or other instrument executed by all the members and by the representatives of deceased members, or a compulsory winding-up."

Society "existing for an illegal purpose."

In a case that arose under the corresponding section (sect. 77) of the Friendly Societies Act, 1896, it was held that the mere fact that a society existed for the purpose of doing acts which were *ultra vires* of its rules did not make it a society which existed for an illegal purpose. "I have no doubt," said Lush, J., "that for the purpose of determining the question whether a society exists for an illegal purpose the time at which the illegality of the purpose is to be considered is the time at which the cancelling order is proposed to be made. The question is not whether the society was brought into existence for an illegal purpose, but whether it exists for such a purpose at the date of the order. . . . I do not think it is necessary, in order to establish that a society is an unlawful society, to show that the rules themselves contemplate the doing of acts which are unlawful. The Court may, and often

must, look behind the rules; and if a society, the rules of which are on the face of them perfectly legal, has as its real object the doing of something unlawful under the cloak of lawful rules, I think that may well be said to be a society existing for an illegal purpose" (*y*).

Winding-up.

A society whose registration has been cancelled can nevertheless be wound up under the Companies (Consolidation) Act, 1908 (*z*).

Rules are binding on members and officers.

The rules, when registered, are binding on the members and officers of the society, and on all persons claiming on account of a member or under the rules, all of whom are deemed to have full notice thereof (*a*). A printed copy of the registered rules, certified by the secretary or other officer to be a true copy, in the absence of evidence to the contrary, is received as evidence of the rules (*b*). This does not exclude the evidence of documents bearing the seal of the central office, or the signature of the chief or an assistant registrar, as to which see *ante*, p. 33.

Copy must be supplied.

The society is bound to supply to any person requiring it a complete printed copy of the rules, with a copy of the certificate of incorporation annexed, at a price not exceeding one shilling (*c*).

Penalty for acting

If any society formed under the Act after Novem-

(*y*) *Re Middle Age Pension Friendly Society*, [1915] 1 K. B. p. 436; 84 L. J. K. B. 378; 112 L. T. 641.

(*z*) *Re "Grosvenor" House Property Acquisition and Investment Building Society* (1902), 71 L. J. Ch. 748; 50 W. R. 630; W. N. 115; 113 L. T. Jour. 135, Buckley, J.

(*a*) Building Societies Act, 1874, s. 21.

(*b*) *Ibid.* s. 20.

(*c*) *Ibid.* s. 17.

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without certificate.

Name of society.

No society can be registered in a name identical with that in which a subsisting society is already registered, or so nearly resembling the same as to be calculated to deceive, unless such subsisting society is in course of being terminated or dissolved, and consents to such registration (*e*). The last words in the name of any society established and incorporated under the Acts must be "Building Society," and the registrar may refuse to allow the insertion in the name of any society about to be established and applying for incorporation of any words implying that the society is other than a building society (*f*).

Name in which society may be registered.

The above restriction as to the name in which a society may be registered is similar to that contained in sect. 8 of the Companies (Consolidation) Act, 1908. In the following cases, injunctions to restrain the defendants from using the name they had adopted, on account of its similarity to that of the plaintiffs, were *refused: Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co., Limited* (*g*); *London Assur-*

(*d*) Building Societies Act, 1874, s. 43.
(*e*) *Ibid.* s. 17. The registrar requires a statutory declaration in such cases.
(*f*) Building Society Regulations, 1895, r. 7.
(*g*) (1864), 33 Beav. 548; 33 L. J. Ch. 741; 10 Jur. N. S. 967; 12 W. R. 783; 10 L. T. 448.

ance v. *London and Westminster Assurance Corporation, Limited* (*h*); *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Co.* (*i*); *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (*j*); *London and County Banking Co.* v. *Capital and Counties Bank* (*k*); *Australian Mortgage Land and Finance Co.* v. *Australian and New Zealand Mortgage Co.* (*l*); *Midland Electric Light and Power Co., Limited* v. *Brush Midland Electric Light and Power Co., Limited* (*m*); *Aerators Limited* v. *Tollett* (*n*).

On the other hand, an injunction was *granted* on this ground in *Accident Insurance Co.* v. *Accident, Disease and General Insurance Corporation* (*o*); *National Folding Box and Paper Co.* v. *National Folding Box Co., Limited* (*p*); and *Manchester Brewery Co., Limited* v. *North Cheshire and Manchester Brewery Co., Limited* (*q*); and would have been granted in *Guardian Fire and Life Assurance Co.* v. *Guardian and General Insurance Co., Limited* (*r*), had not the defendants agreed to change their name; and see also *Army and Navy Co-operative Society, Limited* v.

(*h*) (1863), 32 L. J. Ch. 664; 9 Jur. N. S. 843.
(*i*) (1847), 17 L. J. Ch. 37.
(*j*) (1878), 9 Ch. D. 560; 47 L. J. Ch. 828; 26 W. R. 847.
(*k*) (1878), 9 Ch. D. 567.
(*l*) (1880), W. N. 6.
(*m*) (1882), 26 Sol. J. 465.
(*n*) [1902] W. N. 115.
(*o*) (1884), W. N. 176.
(*p*) (1895), 43 W. R. 156; 13 R. 200.
(*q*) [1898] 1 Ch. 539; 67 L. J. Ch. 351; 46 W. R. 515; 78 L. T. 537; [1899] A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645; 14 T. L. R. 83, 350; 15 *ib.* 110.
(*r*) (1880), 50 L. J. Ch. 253; 43 L. T. 791.

CHAP. IV. *Army, Navy, and Civil Service Co-operative Society of India, Limited* (*s*).

"Subsisting society."

The words "subsisting society" mean a society subsisting at the date of the application to register, and not only a society subsisting at the time of the passing of the Act (*t*).

Where a trade union divided into two sections and each applied to register in the name by which the society had hitherto been known, the registrar was held to have acted rightly in refusing to register either (*u*).

Society must only use registered name.

A society under the Building Societies Acts may not use any name or title other than its registered name; and if any society contravenes this provision, the society, and also every director or member of the committee of management who is a party to the contravention, will be liable on summary conviction to a fine not exceeding ten pounds, and in the case of a continuing offence to an additional fine not exceeding ten pounds for every week during which the offence continues (*v*).

Corporate name.

In the case of an incorporated society the mere corporate name is a sufficient description, without the addition of any further designation or of any address (*w*).

Change of name.

As to the power of a society to change its name, see *infra*, p. 67.

(*s*) (1891), 8 Rep. Pat. Cas. 426.
(*t*) *In the Matter of the Fourth South Melbourne Building Society* (1883), 9 Vict. L. R. Eq. 54.
(*u*) *R.* v. *The Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741; 41 L. J. Q. B. 366; 27 L. T. 229.
(*v*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 15.
(*w*) *The Improved Edinburgh Property Investment Building Society* v. *White's* (1906), 8 F. p. 903; 43 Sc. L. R. 683.

Certificate of registrar not conclusive as to legality of rule.

The certificate of the registrar is not conclusive as to the legality of a rule (*x*). In his judgment in *Laing* v. *Reed* (where the question was as to the legality of a rule conferring a limited borrowing power on the society) Lord Hatherley, L. C., said, "With regard to the argument in this case, two points have been raised by those who contest the decision of the Vice-Chancellor; the one is that the rule is not *ultra vires*, regard being had to the Act; and the other is, that if there be a doubt upon that subject (as I understand the argument, it can hardly be put higher), the certificate of the barrister, who is competent to determine the legal question, should be adopted by us as conclusive. We cannot adopt any possible view of the certificate of the barrister in the particular case before us which would render it conclusive. It could not be contended, and it hardly was contended, that if the matter was plainly *ultra vires*, any certificate of the barrister could prevent the Court from interfering so as to prevent an abuse of power on the part of persons who have certain privileges conferred on them by Parliament. If there were such an abuse of power the certificate of the barrister could have no effect whatever. The words which render him competent to decide upon the legality of the instruments submitted to him, clearly do not apply

(*x*) *Laing* v. *Reed* (1869), 21 L. T. 83; on appeal, 5 Ch. 4; 39 L. J. Ch. 1; 18 W. R. 76; 21 L. T. 773; 34 J. P. 134; *Kelsall* v. *Tyler* (1856), 11 Ex. 513; 25 L. J. Ex. 153; 26 L. T. (O. S.) 226; 20 J. P. 150; *R.* v. *Davis* (1866), W. N. 24; 14 W. R. 329; 13 L. T. 629; 30 J. P. 116; and see also the judgment of Lindley, L. J., in *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. p. 488; 59 L. J. Q. B. 525; 39 W. R. 88; 63 L. T. 511; 6 T. L. R. 214, 449; 55 J. P. 148, *post*, p. 57; *Souter* v. *Davies* (1895), 15 Reports, 261; 39 Sol. J. 264, a case under the Friendly Societies Acts.

CHAP. IV. to such a case as that before us. They probably apply to regulations affecting the engagements between the members themselves; such, for instance, as in what cases the majority might bind the minority. But if the law prohibited the raising of these sums of money, I apprehend that no certificate of the barrister could avail." And see also *Davie* v. *Colinton Friendly Society* (*y*), where it was held in a case in Scotland under a similar Act that the registrar's certificate, though necessary to the validity, was not conclusive of the legality of the rules, or alteration of rules, certified.

Secus, as to regularity of passing.

But though the certificate of the registrar is not conclusive as to the *legality* of a rule, it is conclusive as to the regularity of the proceedings by means of which the rule was passed. This was decided in *Dewhurst* v. *Clarkson* (*z*), where it was held by the Court of Queen's Bench, Erle, J., *diss.*, that where an amendment of the rules of a friendly society had been certified, such amendment was valid, although there had been no resolution of the society in compliance with the 10 Geo. 4, c. 56, s. 9, or with the rules of the society incorporating that section; and this decision was followed by the Court of Appeal in the case of an incorporated building society (*a*). "With regard to the effect of the certificate of registration," said Fry, L. J. (*b*), "I agree that it is conclusive as to the validity of the rules. It is difficult to find any intelligible reason for

(*y*) (1870), 9 Rettie, 96; 8 Sc. L. R. 100; 9 Macp. 96; 43 Sc. Jur. 54.

(*z*) (1854), 3 El. & B. 194; 23 L. J. Q. B. 247; 18 Jur. 693; 23 L. T. (O. S.) 109; 2 C. L. R. 1143; 18 J. P. 535.

(*a*) *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. 373; 37 W. R. 368; 60 L. T. 558; 5 T. L. R. 265.

(*b*) 22 Q. B. D. p. 380.

requiring such a certificate, unless it were intended to furnish proof that the rules had been duly passed. There are no words in the Act making the certificate *primâ facie* evidence only. The Act of 1874, which we have to construe, was passed many years after the decision in *Dewhurst* v. *Clarkson*, and after that decision had been acted on in numerous cases; and I can see no indication of any intention on the part of the legislature to alter the law there laid down. I think, therefore, we are bound by that case." See also *Pare* v. *Clegg* (*c*), where it was held that the certificate of the barrister must be considered conclusive as to the character of the society in question—a friendly society of a peculiar description.

Rosenberg's Case has been followed in Ireland (*d*), and also in New South Wales (*e*). In *Osborne* v. *Amalgamated Society of Railway Servants* (*f*), however, a case which arose under the Trade Union Acts, Lord Justice Fletcher Moulton seems to have felt some doubt as to the correctness of the decision, see his judgment, [1909] 1 Ch. pp. 178, 179.

Certifying rule previously struck out.

In another case one of the rules of a building society authorized the board to issue deposit or paid-up shares for 30*l.* each at 5 per cent. interest, with the right of withdrawing the whole or part of the deposit upon

(*c*) (1861), 29 Beav. 589; 30 L. J. Ch. 742; 7 Jur. N. S. 1136; 9 W. R. 795; 4 L. T. 669; 26 J. P. 53.

(*d*) *Butler* v. *Springmount Dairy Society*, [1906] 2 I. R. 193, 200, a case under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39).

(*e*) *Montgomery* v. *Fox* (1900), 21 N. S. W. R. Eq. 127.

(*f*) [1909] 1 Ch. 163; 24 T. L. R. 827; 25 *ib.* 107; 53 Sol. J. 98; affirmed, [1910] A. C. 87; 79 L. J. (Ch.) 87; 101 L. T. 787; 26 T. L. R. 177; 54 Sol. J. 215.

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notice in preference to all other shares. This rule was struck out by the barrister, but nevertheless the directors printed and acted upon it by issuing shares accordingly. Some years afterwards they amended this rule by altering 30*l.* into 1*l.*, and the amendment was certified by the barrister; and those who had taken 30*l.* shares exchanged them for 1*l.* shares, and others who had not before held paid-up shares took up shares of the new issue. The society was ordered to be wound up. It was held that the effect of the barrister's certicate was to make the rule which had been struck out a valid rule again, but altered by 1*l.* being substituted for 30*l.*; and that the holders of these shares, whether they became such before or after the amendment was certified, and whether they had given notice of withdrawal or not, must be paid in preference to the unadvanced members (*g*).

Registrar refusing to register.

The remedy against the registrar for refusing to register rules is by *mandamus* (*h*). His duty, when a rule is sent to him for registration, is confined, strictly speaking, to seeing whether it is in conformity with law; but he would, it seems, be justified in refusing to register a rule which, though not technically open to

(*g*) *Murray* v. *Scott* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462, affirming on this point the decision below, *nom. Re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134. As to the real ground of this decision, see the discussion in the case of *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. p. 215, and [1914] A. C. p. 449, *nom. Sinclair* v. *Brougham*, by Fletcher Moulton, L. J., and Lord Parker of Waddington.

(*h*) *R.* v. *Brabrook* (1893), 69 L. T. 718; 58 J. P. 117; 10 Reports, 1; 37 Sol. J. 747. The practice in New Zealand appears to be the same; see *Otago Oddfellows* v. *Registrar of Friendly Societies* (1898), 17 N. Z. L. R. 6.

objection, could clearly not have been passed in good faith (*i*).

Housing, Town Planning, &c. Act, 1909.

Sect. 72 of the Housing, Town Planning, &c. Act, 1909 (*j*), provides as follows:—

Formation and extension of building societies.

72.—(1) The County Council may promote the formation or extension of and may, subject to the provisions of this section, assist societies on a co-operative basis, having for their object or one of their objects the erection or improvement of dwellings for the working classes.

(2) The County Council, with the consent of and subject to the regulations made by the Local Government Board, may for the purpose of assisting a society make grants or advances to the society, or guarantee advances made to the society, upon such terms and conditions as to rate of interest and repayment, or otherwise, and on such security, as the Council think fit, and the making of such grants or advances shall be a purpose for which a Council may borrow:

Provided that the regulations of the Board shall provide that any such advance made on the security of any property shall not exceed two-thirds of the value of that property.

The marginal note to the section, it will be observed, speaks of the "formation and extension of building societies." The marginal note, however, forms no part of the Act (*k*), and the language of the section itself —"societies on a co-operative basis, having for their object or one of their objects the erection or improvement of dwellings for the working classes"—is not a very apt description of an ordinary incorporated building society. Possibly the draftsman had in view the preamble to the old repealed Building Societies Act of 1836. No regulations appear to have been made by the Local Government Board under sub-sect. 2.

(*i*) *R.* v. *Brabrook* (1893), 69 L. T. 718; 58 J. P. 117; 10 Reports, 1; 37 Sol. J. 747.

(*j*) 9 Edw. 7, c. 44.

(*k*) *Sutton* v. *Sutton* (1882), 22 Ch. D. 511; 52 L. J. Ch. 333; 31 W. R. 369; 48 L. T. 95.

CHAPTER V.

THE PURPOSES AND POWERS OF A BUILDING SOCIETY.

A. *Incorporated Societies.*

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Object of incorporated society.

THE object of a building society established under the Act of 1874 is to raise by the subscriptions of the members a stock or fund for the purpose of making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage. The society may, so far as necessary for this purpose, hold land with the right of foreclosure, and may also from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Any land, however, to which it may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, must, as soon afterwards as may be conveniently practicable, be sold or converted into money (*a*).

Money-lenders Act, 1900.

An incorporated building society is not a "money-lender" within the meaning of the Money-lenders Act, 1900 (*b*).

(*a*) Building Societies Act, 1874, s. 13.
(*b*) 63 & 64 Vict. c. 51, s. 6 (b).

Security for advances by the society to members.

A building society must confine itself strictly to its proper business as above defined, and if the directors depart from this—if, for instance, they attempt to convert the society into a land society, or make advances on security of a kind not authorized by the Building Societies Acts—they will be guilty of a breach of duty, and will be liable for any loss that may result. Thus, an advance to a member on the security of his shares in the society is plainly *ultra vires*, and directors who make such an advance are personally responsible for the consequences: see *Cullerne* v. *London and Suburban General Permanent Building Society* (*c*). In that case, the directors passed a resolution authorizing advances to members on the security of their shares in the society, in which resolution the plaintiff, who was a member of the board, concurred. They then made an advance to a member, in accordance with the resolution, which resulted in a loss, but the plaintiff was no party to the making of the advance. The Court of Appeal, though holding that the plaintiff, against whom the defendants had counter-claimed, was not liable, inasmuch as the real cause of the loss was the advance and not the resolution—the resolution being only a *causa sine quâ non*, and not the *causa causans*—were clear that an advance on such a security was improper. Lindley, L. J., who delivered the judgment of the Court, said: —"On looking carefully at the statutes by which these societies are governed, viz., 6 & 7 Will. 4, c. 32, s. 4,

(*c*) (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 39 W. R. 88; 63 L. T. 511; 6 T. L. R. 214, 449; 55 J. P. 148; and see also *Re Counties Conservative Permanent Benefit Building Society, Davis* v. *Norton*, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71.

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and the previous statutes there referred to, viz., 10 Geo. 4, c. 56, ss. 2, 13, 30, and 31, and 4 & 5 Will. 4, c. 40, s. 9, it certainly does appear that building societies can only advance money on the security of landed property—freehold, copyhold, or leasehold. The later Act, 37 & 38 Vict. c. 42, ss. 13 and 25, is to the same effect, except that the public funds are added. The 8th rule must be construed with reference to these enactments, and if it authorize advances on other securities, or on no security, it must to that extent be regarded as contrary to law and invalid. The resolutions founded upon that rule, and authorizing advances other than on the security mentioned in the statutes, must also be treated as of no validity. No director, therefore, who has in fact advanced money of the society upon any other security than land, can avail himself either of the rule or of the resolutions as a defence to an action by the society for the restitution of the money so advanced."

Collateral security on personal estate.

The mere fact, however, that pure personal estate is given as collateral security for an advance will not necessarily vitiate the whole loan, though the propriety of the transaction must be tested as if no such ingredient entered into it: see *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (*d*). There the rules provided that advances might be made on (*inter alia*) "legal or equitable (*e*) mortgage of freehold, copyhold, or leasehold property for such periods and at such rate of interest as the board may from time

(*d*) (1889), 44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678; 6 T. L. R. 25.

(*e*) See now Building Societies Act, 1894, s. 13, *post*, p. 61.

to time approve." The directors made an advance upon two securities, the principal of which was a second mortgage of a leasehold colliery, taking at the same time as collateral security a charge upon certain beneficial interests under a trust of personal estate. It was argued that the inclusion of these latter vitiated the whole loan so as to make the directors liable for the very heavy loss in which the transaction finally resulted, but Stirling, J., held that this was not so. "If this contention," said the learned judge, "were well founded, then it would seem to follow that the inclusion in a building society's mortgage of a personal covenant by the mortgagor for repayment of the advance, and reliance placed by the officers of the society on the solvency of the mortgagor, might equally vitiate any transaction of which those were elements. Yet it was not disputed in argument, and in my judgment properly, that a building society making an advance to a member on the security of freehold, copyhold, or leasehold estate, might take from him a personal covenant for payment of what might be due from him to the society; and I think that the officers of the society might, to a certain extent, and for certain purposes, rely on the solvency of the mortgagor. For example, an action on the covenant of a solvent borrower affords an effectual and comparatively speedy and inexpensive mode of recovering what is due, and may be the means of avoiding the delay, costs, and liability incident to remedies (such as foreclosure, sale, or entry into possession) available only against the subject-matter of the security. If the circumstances of the borrower are such that his personal covenant is without value, the building society may, in my opinion, secure a like

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advantage by means of the personal guarantee of a third party, or a charge on some readily available pure personal estate. The benefit so obtained must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874, and the question for the officers of the society to determine is what amount may properly be advanced, and that question they must decide having regard solely to the nature and value of the freehold, copyhold, or leasehold estate offered to them, and without reference to the solvency of the borrower or the worth of any personal estate he may be willing to throw in by way of security."

Liability of surety.

Where a joint and several promissory note was given to secure a loan to a member of a money club, formed for the purpose of raising money by means of monthly subscriptions, and lending it in small sums at interest to the members, and dividing the proceeds when the shares were fully paid up and the loans repaid, it was held that a surety who had joined in the note could not rely on the subscriptions and premiums paid by the principal, as payments in reduction of the surety's liability on the note (*f*).

(*f*) *Wright* v. *Hickling* (1866), L. R. 2 C. P. 199; 36 L. J. C. P. 40; 15 L. T. 245.

Prohibition of advances on second mortgage.

In many societies advances on second mortgage used to be expressly forbidden by the rules, and this very wholesome provision was adopted by the legislature, and made universal, sect. 13 of the Act of 1894 providing that an incorporated society shall not advance money on the security of any freehold, copyhold, or leasehold estate which is subject to a prior mortgage, unless the prior mortgage is in favour of the society making the advance (*g*); and if any advance is made in contravention of this provision, the directors of the society who authorized the advance will be jointly and severally liable for any loss on the advance occasioned to the society (*h*).

Directors liable for improper advance.

Transaction putting society in position of second mortgagee is bad.

Any transaction the effect of which is to put the society in the position of second mortgagee would also, it seems, be bad, although no advance was actually made at the time (*i*).

Scotland and Ireland.

Sect. 13, sub-sect. 1, prohibiting advances on second mortgage, does not, however, apply to any society in Scotland or Ireland which was at the passing of the Act (August 25th, 1894) authorized by its rules to make advances upon second mortgage (*j*); the reason for this provision is no doubt to be found in the difference between the position of a second mortgagee in England and his position in Scotland or Ireland. "In England," says Lord Blackburn, "there are technical reasons why a second security, the mortgage being of

Scotland.

(*g*) Building Societies Act, 1894, s. 13 (1).
(*h*) *Ibid.* s. 13 (3).
(*i*) *Portsea Island Building Society* v. *Barclay*, [1895] 2 Ch. p. 307; 64 L. J. Ch. 579; 12 Reports, 324; 72 L. T. 744, *per* Kay, L. J.
(*j*) Building Societies Act, 1894, s. 13 (2).

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Ireland. In delivering the judgment of the Court of Appeal in *Chapman* v. *Browne* (*l*), Romer, L. J., made the

(*k*) *Small* v. *Smith* (1884), 10 App. Cas. p. 135; *S. C. nom. Shiell's Trustees* v. *Scottish Property Investment Society, in Liquidation*, 12 Rettie (H. L.), 14; 22 Sc. L. R. 139.

(*l*) [1902] 1 Ch. 785, p. 800; 71 L. J. Ch. 465; 86 L. T. 744; 18 T. L. R. 482.

following observations as to second mortgages in Ireland:—"The main question in this action is whether that investment, which was on the security of Irish land subject to prior mortgages, was a breach of trust. Now it is clear that, if a corresponding security had been taken on land in England, it would have been a breach of trust. But it is said that owing to the registration laws affecting incumbrances on lands in Ireland at the time the investment was made, and to the powers of the Irish Courts with regard to the sales of incumbered estates and to the practice not to decree foreclosure in actions concerning mortgages, the security was a safe and proper one for trustees to take. Now undoubtedly the laws and practice to which I have referred do in several respects render a puisne mortgage on land in Ireland a less dangerous or undesirable security than a puisne mortgage on land in England; and it has been decided in Ireland that a loan of trust funds on a second mortgage of land in Ireland is not, of itself, and in the absence of other circumstances, a breach of trust. See *Smithwick* v. *Smithwick* (*m*), and *Crampton* v. *Walker* (*n*), where that view was applied in favour of trustees in respect of securities which, I am bound to say, appear to me on their face to be somewhat undesirable ones for trustees to take. . . . It does not appear to me to be necessary to determine as an abstract question whether or not a second mortgage on land in Ireland is in itself, apart from other considerations, of necessity a bad security for trustees to take for their trust funds.

(*m*) (1861), 12 Ir. Ch. Rep. 181.
(*n*) (1893), 31 L. R. Ir. 437.

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But I think I ought to say this. The judges in Ireland in the cases I have referred to appear to a great extent to base their judgment as to the difference as a security between second mortgages of land in England and second mortgages of land in Ireland on the fact that in Ireland there can be no tacking and no foreclosure. But the objections to second mortgages of land in England are not based solely on the risk of tacking and the liability to foreclosure. There are other objections, and some of these appear to me to apply to, at any rate, some second mortgages of land in Ireland, including the mortgage in question in this action."

Balloting for advances. Where society established after Aug. 25, 1894.

A further important alteration of the law on the subject of advances was also introduced by sect. 12 of the Act of 1894, which provides that a society established after August 25th, 1894, shall not cause or permit the applicants for advances to ballot for precedence or in any way make the granting of an advance depend on any chance or lot (*o*).

Where society established before Aug. 25, 1894.

Where the rules of a society established before August 25th, 1894, provide that advances may be balloted for, the society may, notwithstanding anything in its rules, resolve, by a majority of its members present or voting by voting papers, at a meeting called for the purpose, upon a scheme for the discontinuance of advances by ballot and for making other provision in lieu thereof, provided that the scheme is supported by a majority of such of the members present or voting by voting papers at the meeting as have not at the date of the meeting received their advances by ballot.

(*o*) Building Societies Act, 1894, s. 12 (1).

Every scheme so resolved on, and every alteration thereof, must be registered in the manner provided for the registration of rules, and will be binding on all members and officers of the society (*p*). Registration.

A notice of any such meeting and a copy of the proposed scheme, together with a voting paper, must be sent by post to every member of the society at least fourteen days before the date of the meeting (*q*). Notice of meeting.

In a case that occurred in Queensland it was held that the fact that a society had been duly registered as a building society did not prevent its officials from being convicted under the local statute law of having "unlawfully conducted a lottery," where that was in truth the real business carried on by the society (*r*); but there is, of course, a wide distinction between such a society and the ordinary ballot and sale building society (*s*). The fact that one of the rules may be bad as amounting to "sweep-promoting" does not necessarily make the whole business of the society illegal, if the obnoxious rule is severable from the rest (*t*). Society carrying on illegal business.

In carrying on its business, the society and its officers will, of course, be mainly guided by the rules, which must specify the purposes to which its funds are to be Statutory powers of the society.

(*p*) Building Societies Act, 1894, s. 12 (2). As to registration of rules, see *ante*, p. 40.

(*q*) *Ibid.* s. 12 (3).

(*r*) *Collis* v. *Macgroarty* (1913), S. R. (Q.) 25; 15 C. L. R. 692; Q. W. N. 7; 6 Q. J. P. R. 180.

(*s*) *Mutual Loan Agency* v. *A.-G. for New South Wales* (1909), 9 C. L. R. p. 85, *per* Barton, J.

(*t*) *No. 7 Bowkett Benefit Building Society, Queensland* v. *Warren* (1914), S. R. Queensland, 125, 129; Q. W. N. 23; 8 Q. J. P. R. 94; and see *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421; 81 L. J. K. B. 619; 106 L. T. 433; 28 T. L. R. 276; 56 Sol. J. 342.

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applied, and must also provide for the various other matters mentioned in sect. 16 of the Act of 1874, as amended by sect. 1 of the Act of 1894, to which reference has already been made: see *ante*, p. 35. But, in addition to this, the Building Societies Acts further confer upon every incorporated society a variety of powers and privileges of which it may avail itself in the prosecution of its objects, at the same time imposing upon it certain restrictions. These will now be noticed, reserving, however, the important question of the mode of settling disputes between a society and its members for separate consideration, see *infra*, Chap. IX.

Buildings may be purchased or leased for the purpose of conducting the business of the society.

The society may purchase, build, hire, or take upon lease any building for conducting its business, and may adapt and furnish the same, and may purchase or hold upon lease any land for the purpose only of erecting thereon a building for conducting the business of the society, and may sell, exchange, or let such building, or any part thereof (*u*). Beyond this, however, the society has no power to hold land, and all land acquired by foreclosure, surrender, or other extinguishment of the right of redemption, must be sold as soon as can conveniently be done (*v*).

Change of chief office.

Prior to 1877, a change of the chief office necessitated an alteration of the rules, but under the Act of that year any society may change its chief office in the manner its rules direct, or if the rules contain no such direction, then at a general meeting specially

(*u*) Building Societies Act, 1874, s. 37.
(*v*) *Ibid.* s. 13.

called for the purpose, without altering the rules; nor will the provisions of sect. 18 of the Act of 1874 (as to alteration of rules) apply to such change (*w*), but notice in duplicate of the change, in the Form M. prescribed by the Regulations, must be sent to the registrar within seven days after the change (*x*). The notice must be registered, and a certificate of registration given by the registrar, in the form prescribed by the statute (*y*). CHAP. V.

A fee of 2*s.* 6*d.* is payable for the certificate of change of office (*z*). Fee.

The society may not use any name or title other than that by which it is registered (*a*), but it is at liberty to change its name. This, however, can only be effected by resolution of three-fourths of the members present at a meeting called for the purpose, and the new name must not be identical with that of any society previously registered and still subsisting, or so nearly resembling the same as to be calculated to deceive, unless such subsisting society is in course of being terminated or dissolved, and consents to such registration. The express approval by the registrar of the change of name is not required, but notice of the change must be sent to and registered by him, and he will give a certificate of registration (*b*). Change of name.

As to identity or similarity of names, see *ante*, p. 48.

(*w*) Building Societies Act, 1877, s. 2.
(*x*) Building Society Regulations, 1895, r. 13.
(*y*) Building Societies Act, 1877, s. 2; Building Societies Act, 1894, s. 26.
(*z*) Regulations, r. 41.
(*a*) See Building Societies Act, 1894, s. 15, *ante*, p. 50.
(*b*) Building Societies Act, 1874, s. 22.

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Form of notice.

The notice to be given to the registrar must be in the Form O. annexed to the Regulations, and must be accompanied by a statutory declaration in the Form P.; and the registrar, before issuing a certificate of registration of change of name, is bound to ascertain that there is no such identity or resemblance of name as is mentioned in sect. 22, and in the event of such identity or resemblance may require the society desiring to change its name to satisfy him that such previously registered society is not subsisting, or if subsisting, that it is in course of being terminated or dissolved, and consents to such registration (*c*).

Name.

No change of name can be registered unless the new name ends with the words "Building Society," and the registrar may refuse to allow the retention, in the name of any society which seeks to change its name, of any words implying that the society is other than a building society (*d*).

Form of certificate.

The certificate of registration of a change of name is in the form given in the Third Schedule to the Building Societies Act, 1894 (*e*).

Fee.

A fee of 10*s*. is payable for the certificate of registry of a change of name (*f*).

A change of name does not affect any right or obligation of the society, or of any member thereof, or other person concerned (*g*).

Alteration of rules.

The society may alter its rules from time to time as may be thought expedient, and this important sub-

(*c*) Building Society Regulations, 1895, r. 15.
(*d*) *Ibid.* r. 7.
(*e*) Building Societies Act, 1894, s. 26.
(*f*) Building Society Regulations, 1895, r. 41.
(*g*) Building Societies Act, 1874, s. 22.

ject is dealt with by sect. 18 of the Act of 1874, which is as follows:—

"Any society under this Act, certified previously to the passing of this Act, may alter or rescind any rule or make any additional rule by the vote of three-fourths of the members present at a special meeting called for the purpose, of which meeting notice, specifying the proposed alteration, rescission, or addition shall be given to the members in the manner provided by the rules of the society, or in the absence of such rules by letters sent through the post seven days previous to such meeting; and any society hereafter established may alter or rescind any rule, or make an additional rule, in the manner its rules direct; and every society under this Act altering or rescinding any rule, or making an additional rule, shall forward two copies of every resolution for rescission of a rule, and of every alteration of or addition to its rules, signed by three members and the secretary, and a statutory declaration of an officer of the society that the provisions of this section have been complied with, to the registrar, who, if he find that such alteration, addition, or rescission is in conformity with this Act, shall return one of the copies to the secretary or other officer of the society with a certificate of registration, and retain and register the other copy" (*h*).

This section, it will be observed, divides itself into three parts. First, it provides how a society under the Act, but certified previously to the passing thereof, may alter its rules. Secondly, it provides how a society

(*h*) Building Societies Act, 1874, s. 18.

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established after the passing of the Act may alter its rules. Thirdly, it directs that every society under the Act, whenever established, must on altering or adding to its rules send certain documents to the registrar in order that the alteration may be registered.

Alteration may be—

The alteration may be either—

1. Partial:

(a) A partial alteration, consisting of the addition of a new rule or part of a rule or rules to the existing rules, or of the substitution of a new rule or part of a rule or rules for any of the existing rules, or of a rescission of any of the existing rules or any part thereof without any substitution, or of more than one or all of those modes; or,

2. Complete.

(b) A complete alteration, consisting of the substitution of an entire set of rules for the existing set of rules (*i*).

1. Partial alteration.

An application for the registration of a partial alteration of rules must be made by three members and the secretary of the society, and must be made in the Form D. annexed to the Regulations, and must be accompanied by a statutory declaration in the Form E. annexed thereto, and by a printed copy of the existing rules, and by the following documents:—

(a) If the partial alteration consists of the addition or substitution of a new rule or part of a rule or rules, two copies of such rule or part of a rule or rules, each copy being marked Y. and signed by each of the applicants.

(b) If the partial alteration consists of the rescission

(*i*) Building Society Regulations, 1895, r. 3.

of any of the rules without any substitution, two copies of the resolution for such rescission, each copy being marked Y. and signed by each of the applicants (*j*).

The registrar, before registering a partial alteration of rules, must ascertain that it is in conformity with the Building Societies Acts (*k*).

2. Complete alteration.

An application for the registration of a complete alteration of rules must be made by three members and the secretary of the society, and must be in the Form F. annexed to the Regulations, and must be accompanied by a statutory declaration in Form E. annexed thereto, and by a printed copy of the existing rules and by two printed copies of the new rules, each copy being marked Z. and signed by each of the applicants; and the registrar, before registering the new set of rules, must ascertain that it provides for all matters which are to be provided for by rules, and is in conformity with the Building Societies Acts (*l*).

Certificate.

The certificate of registry of an alteration of rules will be delivered to the applicants attached to one of the copies of the alteration (*m*). The form of certificate now in use expressly states that the registry of rules or alterations does not imply any approval of them by the registrar, or any guarantee of the good management or financial stability of the society (*n*).

Duty of registrar.

As to the duty of the registrar when altered rules

(*j*) Building Society Regulations, r. 4.
(*k*) *Ibid.* r. 4.
(*l*) *Ibid.* r. 5.
(*m*) *Ibid.* r. 6.
(*n*) Building Societies Act, 1894, s. 26, and Schedule there referred to.

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are sent to him for registration, see *R.* v. *Brabrook* (*o*), cited *ante*, p. 54.

Fee.

The fee for the certificate of registry of an alteration of rules is one pound (*p*).

Acting on unregistered alteration.

Until an alteration of rule has been registered it is of no validity; accordingly, where persons who had been appointed directors under an altered rule which had never been certified employed a solicitor on the society's business, they were held personally liable for his bill of costs (*q*).

What alterations will be valid.

The power thus given to a building society of altering its rules is very extensive. Its precise limits have never been exactly defined, but it would seem that any alterations will be valid provided they are confined to the internal rights of the members and are made in good faith (*r*). Thus, it is no objection to an alteration of rules that it is retrospective in its operation (*s*), or that it provides for the rights of members *inter se* in the event of a dissolution or winding-up (*t*), or that it reduces the sums standing to the credit of unadvanced members (*u*), or increases the amount payable on re-

(*o*) (1893), 69 L. T. 718; 58 J. P. 117; 10 Reports, 1; 37 Sol. J. 747.

(*p*) Regulations, r. 41, as altered.

(*q*) *Williams* v. *Belfast Co-operative Building Society*, Recorder's Court, Belfast, May 26th, 1896; and see *Re The Coetmor Benefit Building Society* (1871), 51 L. T. Jour. (O. S.) 253, where a rule conferring borrowing powers had been passed and acted on but never certified.

(*r*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, [1897] 2 Ch. 469, pp. 479, 480; 66 L. J. Ch. 708; 46 W. R. 69; 77 L. T. 235; 13 T. L. R. 531.

(*s*) *R.* v. *Brabrook* (1893), 69 L. T. 718; 58 J. P. 117; 10 Reports, 1; 37 Sol. J. 747.

(*t*) *Ibid.*; but see the case of the *Sixth West Kent Society*, cited below.

(*u*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*.

demption by advanced members (*v*), or operates to the prejudice of members who have given notice of withdrawal (*w*). But no alteration would be valid which was inconsistent with the nature of the society as a building society (*x*), or was aimed at some individual member (*y*), or was in conflict with any express provision of the Building Societies Acts (*z*), or interfered with the rights of outside creditors (*a*).

Arbitration rule.

In a case that arose under the Friendly Societies Act, 1896 (*b*), where there was the usual rule referring disputes to arbitration, the facts were as follows:—On the 11th March, 1910, the plaintiff applied for benefit under the rules; the society on the 2nd April refused the application, and on the 18th April the plaintiff applied for an arbitration. The society assented, but the parties being unable to agree on an umpire no decision was given for upwards of forty days, the effect of which, under sect. 68 of the Act (*c*), was to give the plaintiff the right to go to the County Court, and she accordingly commenced proceedings there on 11th

(*v*) *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. 373; 37 W. R. 368; 60 L. T. 558; 5 T. L. R. 265; and see further, as to advanced members, *post*, p. 287.

(*w*) *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; 62 L. J. Ch. 501; 41 W. R. 548; 68 L. T. 846; 3 Reports, 471; *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, p. 673; 69 L. J. Ch. 266; 58 W. R. 452; 82 L. T. 210; 7 Mans. 417. See further, as to withdrawing members, *post*, p. 239.

(*x*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, *per* Chitty, L. J.

(*y*) *Ibid.*; *Syme* v. *United Victoria Permanent Building Society* (1904), 29 V. L. R. 917.

(*z*) *R.* v. *Brabrook*, *ubi sup.*

(*a*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, *ubi sup.*

(*b*) 59 & 60 Vict. c. 25.

(*c*) The corresponding section in the case of a building society is sect. 35 of the Act of 1874.

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January, 1911. Meanwhile the society, in September, 1910, had amended the arbitration rule by providing that disputes should in the first instance be referred to the general committee with an appeal to an appeal committee. It was held by Pickford and Lush, JJ., reversing the decision below, that the amendment could not deprive the plaintiff of the right which she had already acquired of going to the County Court, and that the action lay (*d*).

Where society is insolvent.

If a society is admittedly in a condition of insolvency it cannot alter its rules so as to vary the rights of the members in a liquidation, though an alteration made under such circumstances but merely for facilitating the realization of the assets, is not, it seems, if fairly acted on, open to objection. This was decided in the winding-up of the Sixth West Kent Society. There the society under its rules had issued three classes of shares, of which two were ordinary and the third preferential, the preference shareholders being entitled to be paid interest in lieu of bonus and other periodical payments. In October, 1889, the society passed a rule that, after December 31st, 1890, no further advances should be made upon shares then existing, and that after the passing of the rule, the withdrawal of shares, other than preference shares, by priority of notice should cease, and that the funds of the society should be applied (amongst other things) to the payment of capital and interest on the preference shares. In October, 1891, the society passed a further rule providing that, in order to facilitate the realization of any pro-

(*d*) *Ritson* v. *Dobson* (1911), 104 L. T. 808.

perties in the possession of the society, the directors should have power to sell the same to any member, and receive in payment any fully paid or subscription shares held by the member, whether under notice of withdrawal or not, provided that such shares should be taken subject to the deduction of any withdrawal fee in force for the time being. At the time of passing the rule of October, 1889, and thenceforward, the society was known both to its officers and members to be insolvent in the sense that its assets were not sufficient to repay in full the sums due to members on their shares, but there were no outside creditors.

Two cases arose on the construction of these rules:— In the first case (*e*), Stirling, J., held that, according to the true construction of the preference share certificates, the holders were only entitled to priority as regards the right to interest and the right to withdraw: that the new rule of October, 1889, gave them a preferential right as regards the payment of capital, to which (in the absence of any notice of withdrawal) they were not entitled under the former rules: and that this new rule was invalid as having been passed when the society was in a known condition of insolvency and with a view to alter the rights of the members in the winding-up which was then in contemplation.

In the second case (*f*), an action was brought by the liquidator against the directors for having acted in pursuance of the new rule of October, 1891, the contention

(*e*) *Sixth West Kent Mutual Building Society* v. *Shove*, [1899] 2 Ch. p. 64, n.; 99 L. T. Journ. p. 213.

(*f*) *Sixth West Kent Mutual Building Society* v. *Hills*, [1899] 2 Ch. 60; 68 L. J. Ch. 476; 47 W. R. 647; 81 L. T. 86.

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being that this rule also was *ultra vires*, but it was held by Byrne, J., that as the rule did not involve any alteration of the constitutional rights of the members it was not invalid, inasmuch as it might be exercised so as to be advantageous to all members alike, and that as there was nothing to show that the rule had not been fairly and honestly acted upon by the directors, the case against them failed and the action must be dismissed; and it was also held that payment of interest to the preference shareholders was in accordance with the contract, and was valid notwithstanding that the society was insolvent.

Sinclair v. *Mercantile Building Society.*

By the rules of a building society prior to January, 1882, unadvanced members were entitled on withdrawal to receive back all instalments paid by them to the society with interest at 4 per cent., but without receiving any of the profits which had been allocated to their shares. In January, 1882, the society passed the following rules:—"15. Members may withdraw their shares on which no advances have been granted, with one-half of the profits allocated thereon till the 31st day of January preceding repayment, and interest on said instalments for the period between the last-named date and said repayment, at a rate per annum equal to one-half of the profits allocated for the previous financial year, on giving one month's written notice to the manager. . . . Such repayments to withdrawing members holding shares subscribed for prior to 31st January, 1881, shall be under deduction of 15 per cent. of the instalments due on, and the profits allocated to, said shares as at last-named date." "17. The books are to be balanced, and the profits or losses declared

at the end of January in each year. At the close of the years during which there have been profits declared, 5 per cent. thereof shall be carried to the reserve account to meet contingent losses, and the balance allocated amongst the shares in proportion to the instalments due thereon, each member's profits being credited to his account, and at the end of his pass-book. At the close of the year during which there have been losses declared, these shall be allocated amongst the shares, each member's loss being debited to his account, and at the end of his pass-book, in the proportion aforesaid." A shareholder who had been a member since 1874, in March, 1882, gave notice of withdrawal under the old rules, maintaining that the new rules 15 and 17 were *ultra vires*. The Court of Session held that under the circumstances the member was barred by acquiescence from disputing the validity of r. 15, and that r. 17 was not *ultra vires* (*g*).

Surety.

An alteration of the rules of a friendly society has been held binding on a surety who had joined a member in a promissory note given as security for an advance (*gg*).

Copy of rules to be supplied.

The society is bound to supply a complete printed copy of its rules, with a copy of the certificate of incorporation appended, to any person who requires it, and may charge for every such printed copy of rules a sum not exceeding one shilling (*h*).

(*g*) *Sinclair* v. *Mercantile Building Investment Society* (1885), 12 Rettie, 1243; 22 Sc. L. R. 820.

(*gg*) *Birmingham and Midland Money Society, Ltd.* v. *King and Another* (1907), 124 L. T. Jour. 181.

(*h*) Building Societies Act, 1874, s. 17.

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Printed copy of rules to be evidence.

A printed copy of the rules, certified by the secretary or other officer of the society to be a true copy of its registered rules, will, in the absence of any evidence to the contrary, be received as evidence of the rules (*i*).

Investment of surplus funds.

The Act of 1874 authorizes every society from time to time, as its rules permit, to invest any portion of its funds not immediately required for its purposes, upon real or leasehold securities, or in the public funds, or in or upon any parliamentary stock or securities, or in or upon any stock or securities payment of the interest on which is guaranteed by authority of Parliament, or, in the case of terminating societies, with other societies under the Act; and for the purpose of investments in the public funds, or upon security of copyhold or customary estate, the society, or the board of directors or committee of management, may from time to time appoint and remove trustees (*j*). This provision has now been extended so as to include power to invest in or upon any security in which trustees are for the time being authorized by law to invest (*k*); and the society may consequently invest its surplus funds in any of the following securities, and may from time to time vary any such investment (*l*):—

(a) The parliamentary stocks or public funds or Government securities of the United Kingdom:

(b) Real or heritable securities in Great Britain or Ireland; "real securities," unless the contrary

(*i*) Building Societies Act, 1874, s. 20.
(*j*) *Ibid.* s. 25.
(*k*) Building Societies Act, 1894, s. 17. This gets rid of the decisions in *Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch. D. 431; (1890) W. N. 117.
(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1.

is expressly stated in the rules, including (1) mortgages of property held for an unexpired term of not less than two hundred years, and not subject to reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry except for non-payment of rent; and (2) any charge, or mortgage of any charge, made under the Improvement of Land Act, 1864 (*m*):

(c) Stock of the Bank of England or the Bank of Ireland:

(d) India Three and a half per cent. stock and India Three per cent. stock, or any other capital stock which may at any time hereafter be issued by Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(e) Any securities the interest of which is for the time being guaranteed by Parliament:

(f) Consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or debenture stock created by the Receiver for the Metropolitan Police District:

(g) Debenture or rent-charge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the

(*m*) Trustee Act, 1893, s. 5 (1). This appears to be the meaning of the section, though the point is not as clear as it might be. It would also seem that the remaining sub-sections of sect. 5 do not apply to investments made under sect. 1 of the Trustee Act, though this again is not very clear. The existence of drainage charges is no bar to an investment on mortgage (sect. 6).

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ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(h) Stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-sect. (g), either alone or jointly with any other railway company:

(i) Debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(j) The "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(k) Stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(l) Debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) Nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand (*n*), or by any county council, under the authority of any Act of Parliament or Provisional Order:

(n) Nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorized by law to be levied:

(o) Any of the stocks, funds, or securities for the time being authorized for the investment of cash

(*n*) See *Re Druitt*, [1903] 1 Ch. 446; 72 L. J. Ch. 441; 88 L. T. 483; 67 J. P. 99; 1 L. G. R. 353.

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under the control or subject to the order of the High Court (*o*).

Colonial stocks.

In addition to the securities above mentioned, a society may now also invest its surplus funds in certain Colonial stocks (*p*).

Purchase at a premium of redeemable stocks.

Any of the above securities may be purchased notwithstanding that the same may be redeemable, and that the price exceeds the redemption value; but it is forbidden to purchase, at a price exceeding its redemption value, any stock mentioned or referred to in paragraphs (g), (i), (k), (l), and (m), which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate; or to purchase any such stock as is mentioned or referred to in the same paragraphs, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate. Any redeemable stock, fund, or security which may have been purchased in accordance with the powers of the Trustee Act may, however, be retained until redemption (*q*).

Deposits in and investments through savings banks.

The society may also—

(a) Deposit in a savings bank any money belonging to the society, provided that the whole amount, exclusive of Government stock, credited by the bank to the society does not exceed three hundred pounds at any one time; and

(*o*) As to the securities at present authorized for the investment of cash under the control or subject to the order of the Court, see Annual Practice, 1920.

(*p*) Colonial Stock Act, 1900 (63 & 64 Vict. c. 62).

(*q*) Trustee Act, 1893, s. 2.

(b) Invest in Government stock through a savings bank any money of the society, provided that the whole amount of Government stock credited by the bank to the society does not exceed five hundred pounds stock at any one time (*r*).

These limits were suspended during the war and six months thereafter (*s*). There seems to be no provision in any of the Savings Banks Acts for the deposit in savings banks of the funds of bodies corporate. The right of a trustee savings bank to accept deposits from a building society is therefore not free from doubt, and before the bank could accept such a deposit special provision would apparently require to be made in its rules (*t*). In the case of a post office savings bank it is expressly provided that deposits may be made in the name of an incorporated building society (*u*).

Unauthorized investment.

Where the trustees of a friendly society advanced 300*l*. on a joint and several promissory note, this not being one of the modes of investment authorized by the Friendly Societies Act, 1875, the Court of Appeal held, reversing the decision of Fry, J., that though the loan was unauthorized, and was a breach of trust, there

(*r*) Building Societies Act, 1894, s. 16 (1). "Savings bank" in this section includes both a trustee savings bank, *i.e.*, a bank certified under the Trustee Savings Bank Act, 1863, and a post office savings bank, but no other; and "Government Stock" means two-and-three-quarters per cent. consolidated stock (1903), two-and-three-quarters per cent. annuities (1905), two-and-a-half per cent. annuities, local loans three per cent. stock and guaranteed land stock; see Building Societies Act, 1894, s. 16 (2); Savings Bank Act, 1893 (56 & 57 Vict. c. 69), s. 5.

(*s*) War Loan (Supplemental Provisions) Act, 1915 (5 & 6 Geo. 5, c. 93); Treasury Minutes, December 31st, 1915; March 17th, 1916.

(*t*) See Watt on the Law of Savings Banks, pp. 115, 117.

(*u*) See Post Office Savings Bank Regulations, 1910, r. 12.

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was nothing illegal in the transaction so as to prevent the trustees from recovering the money against the estate of one of the makers of the note who had died (*v*). But where the trustees of a friendly society advanced money contrary to the express prohibition of the relevant statute, the Friendly Societies Act, 1896, it was held that the transaction was illegal, and that the money could not be recovered (*w*).

When trustees are absent, &c., registrar may order stock to be transferred.

When any person in whose name any stock transferable at the Bank of England or Bank of Ireland is standing, either jointly with another or others, or solely, as a trustee for any incorporated society, is absent from England or Ireland respectively, or becomes bankrupt, or files any petition or executes any deed for liquidation of his affairs by assignment or arrangement, or for composition with his creditors, or becomes a lunatic, or is dead, or if it be unknown whether such person is living or dead, the registrar, on application in writing from the secretary or other officer of the society and three members of the board of directors or committee of management, and on proof satisfactory to him, may direct the transfer of the stock into the name of any other person or persons as trustee or trustees for the society; and such transfer shall be made by the surviving or continuing trustee or trustees, and if there be no such trustee, or if such trustee or trustees shall refuse or be unable to make such transfer, and

(*v*) *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64; 51 L. J. Ch. 3; 30 W. R. 342; 45 L. T. 392; see also *Hardy* v. *Metropolitan Land and Finance Co.* (1872), 7 Ch. 427; 41 L. J. Ch. 257; 20 W. R. 425; 26 L. T. 407, reversing the decision of Romilly, M. R., 12 Eq. 386, cited *post*, p. 121.

(*w*) *Lougher* v. *Molyneux*, [1916] 1 K. B. 718; 85 L. J. K. B. 911; 114 L. T. 696; 60 Sol. J. 605.

the registrar shall so direct, then by the accountant-general or deputy or assistant accountant-general of the Bank of England or Bank of Ireland, as the case may be. The Bank of England and Bank of Ireland respectively are indemnified for anything done by them or any of their officers in pursuance of this provision against any claim or demand of any person injuriously affected thereby (*x*).

Application to transfer stock.

An application to the registrar to direct a transfer of stock must follow as near as may be the Form Q. annexed to the Building Society Regulations. It must be signed by the secretary or other officer of the society and three members of the board of directors or committee of management, and must be accompanied by a statutory declaration in the prescribed Form R. or as near thereto as the facts admit, and by the certificate of the stock in respect of which the application is made. A draft copy on foolscap paper, written on one side only, of the proposed application and declaration must be submitted to the registrar before the application is made; and the registrar, before directing a transfer, may require further proof of any statement in the application. The registrar gives his direction in a specified form so framed in each case as to suit the particular circumstances; and the direction is then registered and delivered to the applicants endorsed with the word "Registered" and duly authenticated (*y*).

Fee.

A fee of one pound is payable on a direction to transfer stock (*z*).

(*x*) Building Societies Act, 1874, s. 26.
(*y*) Building Society Regulations, 1895, rr. 16—19.
(*z*) *Ibid.* r. 41.

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Shares in industrial and provident societies.

A building society may, if its rules permit, hold shares by its corporate name in a society registered or deemed to be registered under the Industrial and Provident Societies Act, 1893 (*a*).

Admittance to copyholds of which society is mortgagee.

Where any society is entitled in equity to any hereditaments of copyhold or customary tenure by way of mortgage, the lord of the manor of which the same are held is bound from time to time, if required by the society, to admit such persons, not more than three, as the society appoints to be trustees on its behalf as tenants in respect of such hereditaments, on payment of the usual fines, fees, and other dues payable on the admission of a single tenant; or he may admit the society as tenant in respect of the same, on payment of such special fine, or compensation in lieu of fine, and fees as may be agreed upon (*b*).

Mortgages of copyholds.

It is not the practice for a mortgagee of copyholds to be admitted in the first instance, as upon admittance a fine becomes due to the lord. The mortgagee, however, incurs no risk by adopting this course, as the admittance when made relates back to the surrender, and he cannot therefore be prejudiced by the previous admittance of any subsequent surrenderee.

Societies may unite with others, or one society may transfer its engagements to another.

Two or more societies may unite and become one society, with or without any dissolution or division of the funds of such societies or either of them, or one society may transfer its engagements to another. But the terms of the proposed union or transfer—(1) Must be agreed upon by three-fourths of the members of each of such societies present at general meetings re-

(*a*) 56 & 57 Vict. c. 39, ss. 42, 79.
(*b*) Building Societies Act, 1874, s. 28.

spectively convened for the purpose; and (2) must obtain the concurrence in writing of the holders of not less than two-thirds of the whole number of shares of each society, whether they are present at the meeting or not (*c*).

Notice of union or transfer.

No approval of the registrar is required for any union or transfer of engagements, but notice in duplicate of every such union or transfer must be sent to him in the form prescribed by the Regulations (*d*). On receiving notice of union, the registrar returns one copy to the united society endorsed with the word "Registered," and duly authenticated, and registers the other copy; and on receiving notice of transfer of engagements he returns one copy to the transferee society similarly endorsed and authenticated, and registers the other copy (*e*).

Fee.

A fee of one pound must be paid for registry of a union or transfer (*f*).

Registration of union of societies or of transfer of engagements operates as effectual conveyance of funds and property of uniting societies

The registration by the registrar of the notice of the union of any societies, or of the transfer of the engagements of any society to another society, operates as an effectual conveyance, transfer, and assignment, as at the date of the registration, of the funds, property, and assets of the society so uniting to the united society, or of the society transferring its engagements to the society to which such engagements may be transferred, as may be set forth in the instrument of union or transfer of engagements, without any conveyance, transfer,

(*c*) Building Societies Act, 1874, s. 33; Building Societies Act, 1894, s. 19.
(*d*) Building Societies Act, 1874, s. 33.
(*e*) Building Society Regulations, 1895, rr. 30, 31.
(*f*) *Ibid.* r. 41, as altered.

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to the united society or to transferee society. Creditors.

or assignment whatsoever, except in the case of stocks and securities in the public funds of Great Britain and Ireland, and estates in copyhold or customary hereditaments the title to which cannot be transferred without admittance. No such union or transfer of engagements, however, will affect the rights of any creditor of either or any society uniting or transferring its engagements (*g*).

What unions or transfers not legal.

There can be no legal union or transfer of engagements between an incorporated society and an unincorporated society, nor between a building society and a company (*h*). Nor can one unincorporated society take over the whole mass of assets and liabilities of another (*i*).

In a case which occurred in Victoria, *Re Metropolitan Permanent Building and Investment Society* (*j*), a banking company had taken over the business of a building society and carried it on for some years, until the affairs of the two concerns had become inextricably involved. Both went into liquidation, and the Court ordered the assets to be administered in the winding-up as if the two had formed one institution only, following the decision in *The Era Company's Case* (*k*).

Societies must make annual

Once in every year, at least, the society must prepare an account of all its receipts and expenditure since the

(*g*) Building Societies Act, 1877, s. 5; Building Societies Act, 1874, s. 33.

(*h*) Guide Book of the Registry of Friendly Societies, 1917, par. 1202.

(*i*) *Re Liverpool and District Permanent Benefit Building Society* (1870), 15 Sol. J. pp. 169, 177.

(*j*) (1901), 26 V. L. R. 642.

(*k*) (1862), 1 De G. J. & S. 29; 32 L. J. Ch. 206; 11 W. R. 59; 7 L. T. 404; 1 N. R. 116.

audits and statements of the funds to the members.

preceding statement, and a general statement of its funds and effects, liabilities and assets, showing the amounts due to the holders of the various classes of shares respectively, to depositors and creditors for loans, and also the balance due or outstanding on their mortgage securities (not including prospective interest), and the amount invested in the funds or other securities (*l*).

Annual account and statement.

Every such account and statement must be made up to the end of the official year of the society to which it relates, and must be in such form and contain such particulars as the chief registrar of friendly societies may from time to time, with the approval of a Secretary of State, direct, either generally or with respect to any society or class of societies. The form prescribed for general use by the chief registrar, and every alteration of that form, must as soon as practicable be laid before each House of Parliament, and will not come into operation until the expiration of forty days from the date at which it is so laid. Every such account and statement must set forth—

(a) With respect to mortgages to the society upon each of which the present debt does not exceed five thousand pounds (not being mortgages where the repayments are upwards of twelve months in arrear, or where the property has for upwards of twelve months been in possession of the society), the number of all such mortgages, and the aggregate amount owing thereon at the date of the account or statement, such informa-

(*l*) Building Societies Act, 1874, s. 40.

tion being given separately in respect of each of the four following classes:—

(i) Where the debt does not exceed five hundred pounds:

(ii) Where the debt exceeds five hundred pounds and does not exceed one thousand pounds:

(iii) Where the debt exceeds one thousand pounds and does not exceed three thousand pounds:

(iv) Where the debt exceeds three thousand pounds and does not exceed five thousand pounds; and

(b) With respect to any other mortgage to the society, the particulars shown by the appropriate tabular form in the First Schedule to the Building Societies Act, 1894 (*m*).

Form of account and statement.

The form of the annual account and statement prescribed by the chief registrar for the use of incorporated societies, together with a memorandum as to the mode of making out the account and statement, may be obtained on application to the registrar. The actual form of return supplied to the society should be returned to the office, and not a printed copy of it. The registrar has no authority to dispense with any part of the prescribed form.

Prospective interest.

It should be particularly noticed that prospective interest must not be included in the account and statement.

(*m*) Building Societies Act, 1894, s. 2 (1).

Account must be audited.

Every such account and statement must be attested by the auditors, to whom the mortgage deeds and securities belonging to the society must be produced, and such account and statement must be countersigned by the secretary or other officer (*n*); and every auditor, in attesting any such annual account or statement, must either certify that it is correct, duly vouched, and in accordance with law, or specially report to the society in what respect he finds it incorrect, unvouched, or not in accordance with law; and must also certify that he has at that audit actually inspected the mortgage deeds and other securities belonging to the society, and must state the number of properties with respect to which deeds have been produced to and actually inspected by him (*o*).

Copy of account to be sent to members and others.

A copy of the account and statement must be sent to every member, depositor, and creditor for loans; another copy must be suspended in a conspicuous place in every office of the society; and another copy must be sent to the registrar within fourteen days after the annual or other general meeting at which it was presented, or within three months after the expiration of the official year of the society, whichever period expires first (*p*).

"Official year."

The expression "official year" means, in the case of any society established after August 25th, 1894, the year ending with the thirty-first day of December, and, in the case of any society established before that date,

(*n*) Building Societies Act, 1874, s. 40.
(*o*) Building Societies Act, 1894, s. 2 (2).
(*p*) Building Societies Act, 1874, s. 40; Building Societies Act, 1894, s. 2 (3).

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the year ending with the time up to which its annual account and statement was made at that date (*q*).

The returns of building societies are kept by the registrar, but he is not required to register them.

Offences by building societies.

If any society formed since November 2nd, 1874, or any persons representing themselves to be a society under the Building Societies Act, 1874, commence business without obtaining a certificate of incorporation under that Act, or if any society under the Act makes default in inserting in any deposit book or acknowledgment, or security for loan, the matters required by sect. 15 of the Act to be inserted therein, the person or persons by whom such business shall have been so commenced, or by whom such default shall have been made, will be liable for every day such business is so carried on, or for every such default, upon summary conviction before justices, at the suit of the registrar, to a penalty not exceeding five pounds (*r*).

As to the liability of the society and its officers, if the society uses any name other than its registered name, or accepts deposits except on the terms allowed by sect. 15 of the Building Societies Act, 1894, see pp. 50, 107.

Failure to comply with provisions of the Acts.

If any society under the Building Societies Acts neglects or refuses—

(a) to give any notice, send any return or document, or do or allow to be done anything which the

(*q*) Building Societies Act, 1894, s. 2 (4). This section came into operation on Aug. 25, 1895.

(*r*) Building Societies Act, 1874, s. 43, as amended by Building Societies Act, 1894, s. 28.

society is by those Acts required to give, send, do or allow to be done; or,

(b) to do any act or furnish any information required for the purposes of those Acts by the registrar or by an inspector;

the society, and also every officer thereof bound by the rules thereof to fulfil the duty whereof a breach has been so committed, and if there is no such officer, then every member of the committee of management or board of directors of the society, unless it appears that he was ignorant of or attempted to prevent the breach, shall for each offence be liable, on summary conviction, to a fine not exceeding twenty pounds, and in the case of a continuing offence, to an additional fine not exceeding five pounds for every week during which the offence continues (*s*).

Failure to make returns.

Where a society has, for two months after notice, failed to make any return, or to correct or complete any return, the registrar may, with the consent of the Secretary of State, given on each occasion, appoint an inspector or call a special meeting of the society (*t*). As to the powers of such an inspector and of the meeting, see *post*, p. 231.

False entries.

If any person wilfully makes, orders, or allows to be made any false statement in any document required by the Building Societies Acts to be sent to the registrar, or by erasure, omission, or otherwise wilfully falsifies any such document, he will be liable on summary conviction to a fine not exceeding fifty pounds (*u*).

(*s*) Building Societies Act, 1894, s. 21.
(*t*) *Ibid.* s. 5, sub-s. 5.
(*u*) *Ibid.* s. 22.

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Exemption from stamp duties.

No rules of any incorporated society, nor any copy thereof, nor any power, warrant, or letter of attorney granted or to be granted by any person as trustee for the society for the transfer of any share in the public funds standing in his name, nor any receipts given for any dividend in any public stock or fund, or interest of exchequer bills, nor any receipt, nor any entry in any book of receipt, for money deposited in the funds of the society, nor for any money received by any member, his executors or administrators, assigns, or attorneys, from the funds of the society, nor any transfer of any share, nor any bond or other security to be given to or on account of the society, or by any officer thereof, nor any order on any officer for payment of money to any member, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever required or authorized to be given, issued, signed, made, or produced in pursuance of the Act, or of the rules of the society, are subject or liable to or charged with any stamp duty or duties whatsoever, but this exemption does not extend to any mortgage; mortgages, therefore, must be stamped in the ordinary way (*v*).

Exemption does not extend to mortgages.

General rule as to exemption.

The general rule as regards exemption under the above section is that it extends only to documents required or authorized for the purpose of carrying on the internal affairs of the society, or required or authorized for the purpose of bringing the society into a position to carry on business with the outside world;

(*v*) Building Societies Act, 1874, s. 41.

it does not extend to all documents which may be necessary in the course of carrying on the business of the society (*w*).

Duty chargeable only on principal money.

In building society mortgages, where, as is usually the case, the mortgagor covenants to pay by instalments a sum of money which represents principal and ascertained interest, duty is charged on the principal money only (*x*).

Reconveyance.

A reconveyance by deed is exempt from duty, and the right of exemption is not lost by reason of the trustees under an instrument of dissolution concurring in the deed (*y*). A reconveyance by way of statutory receipt is also exempt (*z*); and as the statutory receipt vacates the mortgage, a warrant to vacate a surrender of copyholds included in such mortgage is not liable to duty (*a*).

Cheques.

In a case that occurred in New Zealand one of the rules of the society provided that "all payments shall be made by cheques upon the society's bank"; cheques were given by the society for petty cash used by it in its business, and also for the purpose of making payments to its members, and of paying ordinary business accounts, such as rent and stationery. The language of the relevant statute was almost identical (except as regards mortgages) with that of sect. 41 of the English Act. It was held that the cheques were exempt from

(*w*) Alpe's Law of Stamp Duties, 14th ed. p. 274.
(*x*) *Ibid.* p. 195.
(*y*) *Old Battersea and District Building Society* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 294; 67 L. J. Q. B. 696; 78 L. T. 745.
(*z*) *Ibid.*
(*a*) Alpe's Law of Stamp Duties, 14th ed. p. 275.

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duty (*b*). Whether a like decision would be given in this country may perhaps be doubted.

"Receipt."

As to the meaning of the word "receipt," see *Attorney-General* v. *Phillips* (*c*), cited *post*, p. 125, where a receipt for rent was held liable to duty.

"Bond or other security."

As to the meaning of "bond or other security," see *Re Royal Liver Friendly Society* (*d*), cited *post*, p. 126.

Liability for income-tax.

Whether building societies and their members are liable for income tax is a question on which there has been some difference of opinion, but the following points seem to be now settled:—(1) Advanced members on making their repayments are entitled to deduct the tax on so much of each periodical instalment as is in fact payment of interest; see the cases cited *post*, p. 302. (2) A society which does not allow its advanced members to make this deduction must pay the tax on the full amount of interest that it receives, as being "interest of money" (*e*). (3) Where a society allows to the whole of its advanced members duty upon the interest included in their repayments, the full income-tax liability is covered. In order to meet the convenience of building societies and their members, and to avoid the trouble of claims of repay-

(*b*) *Withers* v. *Mutual Benefit Building and Investment Society of Canterbury* (*Permanent*) (1908), 27 N. Z. L. R. 584; 10 Gaz. L. R. 479.

(*c*) (1871), 24 L. T. 832; 19 W. R. 1146.

(*d*) (1870), L. R. 5 Ex. 78.

(*e*) See *Leeds Benefit Building Society* v. *Mallandaine*, [1897] 2 Q. B. 402; 66 L. J. Q. B. 813; 77 L. T. 122; 13 T. L. R. 535; 61 J. P. 675; 3 Tax Ca. 577; affg. 45 W. R. 501; 13 T. L. R. 358; and see *London County Council* v. *Grove* (1896), 45 W. R. 279; 61 J. P. 52; *Clerical, Medical, and General Life Assurance Society* v. *Carter* (1889), 22 Q. B. D. 444; 58 L. J. Q. B. 224; 37 W. R. 392; 53 J. P. 499; affg. 59 L. T. 438; Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D., Rules applicable to Case III.

ment where the shareholders and depositors are exempt, the Board of Inland Revenue are willing, upon application from a society, to enter into an arrangement under either of two schemes, which have been prepared by the Board, for the discharge of any liability upon the part of the society, its shareholders, depositors and borrowers, so far as interest is concerned. The memorandum of the Board on this subject is as follows:—

MEMORANDUM *of alternative arrangements sanctioned by the Board of Inland Revenue with respect to Income Tax in the case of Building Societies.*

Arrangement A.

1. All interest to be exempted where the borrowing member is exempt by reason of his total income from all sources not exceeding 130*l.*, the society undertaking to see that the borrowers make the usual claim to the surveyor of taxes for the district in which they reside, and otherwise afford facilities to the surveyor or surveyors for the requisite verification of the claims.

2. Where the borrowers are not so exempt, the properties on which the interest is secured by mortgage, or otherwise, to be retained in charge according to their respective annual values, and the society to allow the borrower to deduct the tax applicable to the interest.

3. All property in the society's hands as mortgagees in possession, to be exempted, except as to ground or lease rents, if any.

4. The society to furnish a statement, to be verified by the Board's surveyor of taxes once a year, of the interest paid or credited to depositors and members whose incomes exceed 130*l.* a year, from whom the society would have the right to deduct the tax, whether the society exercised the right or not.

5. The society to furnish a list of the interest received from the borrowers to whom the society has allowed the tax, with

all necessary particulars of the properties assessed, and vouchers, in the shape of certificates of deduction of the tax on the annexed form No. 185.

6. Where the total interest received (par. 5), on which the society has allowed the tax, exceeds the total interest paid or credited (par. 4), and on which the society has the right to retain the tax, the society to be repaid the duty on the difference; and where the converse is the case, that is, where the tax which ought to be retained by the society exceeds the tax allowed by the society, the society to render a return of the difference for assessment under Schedule D of the Income Tax Acts.

Arrangement B.

1. The society consents to be directly assessed under Schedule D of the Income Tax Acts upon the amount paid or credited in the year preceding the year of assessment for, or in respect of, dividends on shares, bonuses, and deposit interest. One-half of the total amount to be charged with income tax and one-half allowed to cover exemptions.

In consideration of such direct assessment:—

2. All property in the society's hands as mortgagees in possession to be exempted, except as to ground or lease rents, if any.

3. A borrower whose total income from all sources does not exceed 130*l.* is not to be charged for mortgage interest: if charged, the duty assessed in respect of the mortgage interest is either to be allowed as a double assessment, or repaid by the Board of Inland Revenue.

4. A borrower, not entitled to exemption, to be repaid by the Board of Inland Revenue such portion of the duty charged on his property as is applicable to mortgage interest. Application for repayment to be made to the Board, and supported by a certificate from the secretary of the society as to the amount of mortgage interest paid for the year of assessment; or, the amount of interest so certified may be allowed from the assessment.

5. Investors and depositors not to be charged for the divi-

dends or interest they receive: if charged, on proof thereof, to be entitled to relief.

6. When required, any society accepting this arrangement to permit any duly appointed officer of the Board to test the accuracy of the amount returned for Schedule D assessment, or to verify the correctness of any certificate given under the arrangement.

N.B.—These arrangements have been sanctioned by the Board for the convenience of building societies and their members. It should be noted that societies registered under the Building Societies Acts *are not exempt from income tax.*

Forged Transfers Act, 1891.

Under the provisions of the Forged Transfers Act, 1891, a building society may make compensation out of its funds for any loss arising from a transfer of any of its shares or securities in pursuance of a forged transfer, or of a transfer under a forged power of attorney, and may exercise the other powers conferred by the Act (*f*).

The society is discharged by payment to a registered shareholder without notice that he is only a trustee (*g*).

Power to borrow money.

The power of an incorporated building society to borrow money depends mainly on sect. 15 of the Act of 1874, which is in the following terms:—

"With respect to the borrowing of money by societies under this Act, the following provisions shall have effect:

"(1) Any society under this Act may receive deposits or loans, at interest, within the limits in this section provided, from the members

(*f*) Forged Transfers Act, 1891 (54 & 55 Vict. c. 43), ss. 1, 3; amended by Forged Transfers Act, 1892 (55 & 56 Vict. c. 36).

(*g*) *Nolloth* v. *Simplified Building Society* (1885), 34 W. R. 73; 53 L. T. 859; 2 T. L. R. 97, *post*, p. 211.

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or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society:

"(2) In a permanent society the total amount so received on deposit or loan and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members:

"(3) In a terminating society the total amount so received and not repaid may either be a sum not exceeding such two-thirds as aforesaid, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force:

"(4) Any deposits with or loans to a society under this Act, made before the commencement of this Act in accordance with its certified rules, are hereby declared to be valid and binding on the society; but no further deposits or loans shall be received by such society, except within the limits provided by this section:

"(5) Every deposit book or acknowledgment or security of any kind given for a deposit or loan by a society, shall have printed or written therein or thereon the whole of the fourteenth and fifteenth sections of the present Act"(*h*).

Limits of borrowing power:—

This section, it will be noticed, confers upon all incorporated societies a power to borrow money within

(*h*) Building Societies Act, 1874, s. 15.

certain prescribed limits. In the case of a permanent society the sum borrowed must not exceed two-thirds of the amount for the time being secured to the society by mortgages from its members; in the case of a terminating society it may be either (1) a sum not exceeding such two-thirds, or (2) a sum not exceeding twelve months' subscriptions on the shares for the time being in force. In the case of societies established since November 2nd, 1874, the rules must state whether the society intends to borrow money, and if so, within what limits, not exceeding those prescribed by the Building Societies Acts (*i*); and the same provision now applies in the case of every society substituting a new set of rules for its existing rules (*j*).

In permanent society; In terminating society.

Whichever of the two alternative limits allowed by sect. 15 the rules of a terminating society adopt, the directors will be bound by; and if they exceed such limit they will, under the statute, be personally liable for the excess, even though the borrowing be not in excess of the other alternative limit allowed by the section (*k*).

The limit prescribed by the rules cannot be exceeded.

In ascertaining the "amount for the time being secured to the society by mortgages from its members," within the meaning of sub-sect. 2, such amount is not to be confined to the amount of principal secured, but covers all sums due on the members' securities at the time of the loans to the society, whether for principal,

"Amount for the time being secured to the society by mortgages from its members."

(*i*) Building Societies Act, 1894, s. 1 (h), in substitution for sect. 16 (2) of the Act of 1874, which is repealed.

(*j*) Building Societies Act, 1894, s. 1 (h).

(*k*) *Looker* v. *Wrigley, Leigh* v. *Wrigley* (1882), 9 Q. B. D. 397; 46 J. P. 758; and see Building Societies Act, 1874, s. 43, *post*, p. 110.

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or interest, or fines, or otherwise, and all instalments not then accrued due but secured by the mortgage and outstanding (*l*). It also includes moneys secured to the society by mortgages from its members, though not advanced to them in respect of their shares; but not, of course, moneys secured to the society by mortgages from persons who have borrowed money from the society without being members (*m*).

Limitation on borrowing power.

The Act of 1894 imposed a check on the borrowing powers conferred by sect. 15. That section, it will be observed, makes no distinction between the mortgages on which the two-thirds calculation is to be based; and the consequence was that in ascertaining the extent of the borrowing powers, all mortgages from the members to the society were taken into account, even including securities which it was known were insufficient, and must result in a loss if any attempt were made to enforce or realise them. This was altered by the Act of 1894, which provides as follows:—

"Amount for the time being secured."

"In calculating the amount for the time being secured to a society under the Building Societies Acts by mortgages from its members for the purpose of ascertaining the limits of its power to receive deposits or loans at interest, the amount secured on properties the payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, and the amount secured on properties of which the society had

(*l*) *Neath Building Society* v. *Luce* (1889), 43 Ch. D. 158; 59 L. J. Ch. 3; 38 W. R. 122; 61 L. T. 611; 6 T. L. R. 13.

(*m*) *Ex parte Johnson and Greenwood* (1890), 45 Ch. D. 463, 468; 59 L. J. Ch. 823; 39 W. R. 74; 63 L. T. 483.

been twelve months in possession at the date of such account and statement, shall be disregarded. Provided that this section shall not affect the validity of any deposit or loan which was within the limit provided by law at the time when it was received, and so far as regards any amount secured either on properties the payments in respect of which are upwards of twelve months in arrear at the passing of this Act, or on properties in the possession of the society at the passing of this Act, shall not come into operation until the expiration of three years from the passing of this Act" (*n*).

Total amount borrowed.

In ascertaining the limits of the society's borrowing powers, the total amount borrowed must be considered, without regard to the source from which it was obtained (*o*); and a loan to a society from its bankers made by allowing the society to overdraw its account is a "loan" within sect. 15 of the Act of 1874 (*p*). A distinction has been taken in some cases between overdrawing a banking account, or (as it is called) "taking advantage of banking facilities," and other kinds of borrowing (*q*), but this distinction is now exploded—all over-drafts are, in effect, borrowings (*r*).

Over-drawing banking account is borrowing.

Sub-sect. 5 is directory only.

The enactment in the fifth sub-section of sect. 15 is

(*n*) Building Societies Act, 1894, s. 14. The Act was passed on Aug. 25th, 1894.

(*o*) *Ex parte Johnson and Greenwood, ubi sup.*

(*p*) *Looker* v. *Wrigley, Leigh* v. *Wrigley, ubi sup.; Cunliffe Brooks & Co.* v. *Blackburn Benefit Building Society* (1884), 9 App. Cas. 857; 54 L. J. Ch. 376; 33 W. R. 309; 52 L. T. 225.

(*q*) *Re Cefn Cilcen Mining Co.* (1868), 7 Eq. 88; 38 L. J. Ch. 78; 19 L. T. 593; *Waterlow* v. *Sharp* (1869), 8 Eq. 501; 20 L. T. 902; both decided by Stuart, V.-C.

(*r*) *Per* Farwell, J., *A.-G.* v. *De Winton*, [1906] 2 Ch. p. 120; 75 L. J. Ch. 612; 54 W. R. 499; 70 J. P. 368; 4 L. G. R. 549; 22 T. L. R. 446.

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directory only, and non-compliance with it does not affect the validity of any security given for a loan (*s*).

Particulars of *ultra vires* loans.

In *North London Commercial Permanent Building Society* v. *Parr's Banking Co.* (*t*), an action was brought by a liquidator against the society's bankers to impeach a great number of advances which they had made to the society, on the ground that when they were made there was no borrowing power available, and to recover money which the bankers had repaid themselves in the account. It was admitted by all parties that the borrowing power at any given moment was equal to two-thirds of the mortgages *minus* the good loans; and that any advance in excess of the borrowing power was not to be counted in the good loans, but treated as *eo instanti* and permanently void, and not capable of being validated by any doctrine of relation back on a subsequent revival of such intermittent borrowing power by payment off of good loans, or an increase of mortgages. The defendants, before putting in their defence, applied for particulars of the loans which the plaintiffs intended to impeach at the trial, and Chitty, J., held that they must be given.

Security for money borrowed by society.

It would seem that the society may properly give security for the money borrowed, as being incident to an effective exercise of the borrowing power; and the legislature appears to have acted upon this view, for although the Act of 1874 contains no express power to give security, it provides (sect. 15, sub-sect. 5, and

(*s*) *Re Guardian Permanent Benefit Building Society, Hawkins' Case* (1882), 23 Ch. D. 440, 452; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134.

(*t*) (1895), 40 Sol. J. 98.

sect. 19) for the form of the securities which it is taken for granted will be given by a society for loans advanced to it under the borrowing power (*u*). If security is given, it generally takes the form of a sub-mortgage by deposit of the securities given to the society by its members, a building society having as a rule no other property which it can offer as security. In every such case, however, it should be seen that the rules contain nothing inconsistent with the power to give a security upon specific properties; see the cases of *Agnew* v. *Murray* and *Small* v. *Smith*, cited *post*, pp. 128, 129.

Security for loan.

In *Baker* v. *Landport and Mid-Somerset Benefit Building Society* (*v*) the plaintiff advanced money to the defendant society, and by a document under its seal the society acknowledged the receipt of the loan, and declared that "the funds and property of the society are hereby liable for the repayment." The rules contained a power to borrow, and made the receipt of the directors a good discharge for the money borrowed. It was held by Eve, J., that whether the document was to be called a debenture or a mortgage-debenture

(*u*) See *Murray* v. *Scott* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462; *Wilson's Case* (1871), 12 Eq. 516, 521; 41 L. J. Ch. 125; 25 L. T. 84; *Re Bristol and Western Counties Permanent Building Society* (1882), 72 L. T. Journ. p. 462, which is an express decision upon the point by Judge Metcalfe, Q.C.; *Re Patent File Co.* (1870), 6 Ch. 83; Fisher on Mortgages, 6th edition, p. 148. There are, however, certain *dicta* which express a contrary view; see *Murray* v. *Scott*, 9 App. Cas. p. 556, *per* Lord Blackburn, and *Moye* v. *Sparrow* (1870), 18 W. R. p. 402, *per* James, V.-C.; but both these cases were prior to the Act of 1874, and these *dicta* cannot therefore, it is conceived, be regarded as of much weight in considering the powers of a society incorporated under that Act.

(*v*) (1912), 56 Sol. J. 224.

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was immaterial; the funds and property of the society were appropriated to the payment of the loan, and there was thus a good equitable assignment, and an action claiming the appointment of a receiver and a declaration of charge was therefore properly instituted.

Where directors borrowed 400*l.*, and gave as security a bond by which the society covenanted to repay the amount three months after demand, and half-yearly interest at the rate of 6 per cent., and by which it was declared that "all the funds, assets, and effects of the society shall be held liable for the repayment of the 400*l.* and interest," it was held that the security (which was one of several in similar form), though it created an equitable charge, did not amount to a mortgage which could be enforced by foreclosure (*w*).

In *Walmsley* v. *Rice* (*x*) the rules empowered the trustees to borrow for the purposes of the society, either as representing the society and binding its assets, or on their own personal security by bond or promissory note, and in the latter case the assets were to be charged with or become liable to pay to the trustees all sums which they might be called upon to pay under the security. A testatrix had lent money to the trustees on the security of a charge declaring that the trustees thereby bound and charged the assets of the society with the repayment of the loan. It was held that the so-called "charge" was not a charge at all, but only a security by way of promise by the society to pay the money—

(*w*) *Andrew* v. *Swansea Cambrian Benefit Building Society* (1880), 50 L. J. Q. B. 428; 44 L. T. 106; 45 J. P. 507; *S. C. nom. Jones* v. *Swansea, &c. Society*, 29 W. R. 382.

(*x*) (1885), 29 Sol. J. 256; 1 T. L. R. 251, C. A.

in short, a mere debt, and was therefore not within the Mortmain Act. CHAP. V.

Where a society authorized three of its officers to borrow money from the society's bankers on their joint and several promissory note, and the bankers became bankrupt, it was held that the society might set off the amount due to it from the bankers against the sum due on the note (*y*). Set-off.

The society may not accept any deposit except on the terms that not less than one month's notice may be required by the managers of the society before repayment or withdrawal, and for any breach of this provision, the society, and also every director or member of the committee of management who is a party to the breach, will be liable on summary conviction to a fine not exceeding ten pounds, and in the case of a continuing offence to an additional fine not exceeding ten pounds for every week during which the offence continues (*z*). Notice of withdrawal of deposit.

On receiving money on deposit it is not unusual for the society to stipulate that if more depositors give notice to withdraw than the funds in hand will suffice to pay, they shall be paid according to priority of notice. The proper construction to be placed upon a provision of this kind was considered in a case which occurred some years ago, and gave rise to a considerable difference of judicial opinion. In the case in question, it was a condition of the deposit that "if the available balance in hand shall be at any time insufficient to Withdrawal by depositors.

(*y*) *Ex parte Clennell, Re Davies* (1861), 9 W. R. 380; 4 L. T. 60.

(*z*) Building Societies Act, 1894, s. 15 (1).

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pay all the depositors wishing to withdraw, they shall be paid in rotation, according to the priority of their notices." A depositor gave notice to withdraw, and his deposit not being repaid he brought an action to recover it. The action was tried in the Mayor's Court, and the Common Serjeant held that the fact that the available balance in hand was insufficient to pay all the depositors who had given prior notice to withdraw, was an answer to the action. A Divisional Court (Charles and Wright, JJ.) reversed this decision, though with hesitation. On appeal, however, it was held by Lord Esher, M. R., and Lopes, L. J., Kay, L. J., doubting, that the decision of the Common Serjeant was right, and that the action was premature. "The condition means," said the Court, "that the defendant society may postpone payment and the depositors' right to recover until there is an available balance in hand sufficient to pay depositors in rotation, according to the priority of their notices. The plaintiff brought his action too soon, and at a time when, according to condition 6, the money, though due, was not payable" (*a*).

"Available balance in hand."

The Court further held that the words "available balance in hand" did not mean merely cash in hand, but included money which the society could obtain by realizing investments; and in this opinion Lord Justice Kay concurred, adding, however, that it was subject to the society's right to retain the sums requisite for carrying on their business and paying their officials

(*a*) *Brett* v. *Monarch Investment Building Society*, [1894] 1 Q. B. 367; 63 L. J. Q. B. 237; 42 W. R. 209; 70 L. T. 146; 9 R. 141, 203; 58 J. P. 367; 10 T. L. R. 16, 187; 38 Sol. J. 183.

and meeting other necessary expenses; the term "available" indicating that what was intended was the balance after deducting the current expenses of the society.

Production of loan pass book.

Where a depositor lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, and that no money would be paid out of the society except on production, by the lender personally or by some one with his written authority, of a loan pass-book given to him when the loan was made, it was held that the condition as to the production of the book was a condition precedent to the liability of the society to repay the money, so that, until that condition had been complied with, the Statute of Limitations did not begin to run against the lender (*b*).

Investment in deposits.

Where trustees were authorized to invest "in good real or personal securities," it was held in New South Wales that they might invest in fixed deposits of a building society for which they merely obtained receipts (*c*).

A depositor will be bound by the rules of the society, if they so provide; see *post*, p. 211. A depositor who made his deposit when the borrowing power had been exceeded can claim no priority over other depositors merely because he lent his money prior to the defal-

(*b*) *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360; 38 W. R. 630; 62 L. T. 857; and see *Re Tidd, Tidd* v. *Overell*, [1893] 3 Ch. 154; 62 L. J. Ch. 915; 42 W. R. 25; 69 L. T. 255; 3 R. 657.
(*c*) *Logan* v. *Roper* (1898), 19 N. S. W. R. Eq. 173.

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cations of the secretary which brought about the collapse of the society (*d*).

A document, in form a mere receipt given by a depositor to a building society that received money on deposit, may properly be described in an indictment for forgery as a "warrant," "authority," or "request" for the payment of money, if, by the custom of the society, such receipts are in fact treated as warrants, authorities, and requests for the payment of money (*e*).

Payment of sums not exceeding 50*l.*

As to payment of sums not exceeding 50*l.* on the death of a depositor intestate without taking out letters of administration, see sect. 29 of the Act of 1874, *post*, p. 236.

Liability of directors for money borrowed in excess of borrowing power.

If any incorporated society receives loans or deposits in excess of the prescribed limits, the directors or committee of management of such society receiving such loans or deposits on its behalf will be personally liable for the amount so received in excess (*f*). The effect of this provision was considered by the Court of Appeal in *Cross* v. *Fisher* (*g*). The facts there were as follows:—The society was authorized by its rules to receive money on deposit, but not exceeding the usual two-thirds limit. The course of business authorized by the directors was that the secretary gave a provisional receipt to the depositor, and then prepared a formal

(*d*) *Re Cape of Good Hope Permanent Building Society* (1900), 17 S. C. R. 29.

(*e*) *R.* v. *Kay* (1870), L. R. 1 C. C. R. 257; 39 L. J. (M. C.) 118; 11 Cox, 529; 22 L. T. 557.

(*f*) Building Societies Act, 1874, s. 43.

(*g*) [1892] 1 Q. B. 467; 40 W. R. 265; 66 L. T. 448; 8 T. L. R. 220; 56 J. P. 372; 36 Sol. J. 198; affirming the decision below, 65 L. T. 114; and see *Looker* v. *Wrigley*, *Leigh* v. *Wrigley* (1882), 9 Q. B. D. 397; 46 J. P. 758, cited *ante*, p. 101.

receipt, which was signed by two directors and countersigned by himself. The secretary received moneys on deposit in this way to an amount largely in excess of the prescribed limit, appropriating to his own use a great part of the money deposited, and managing the books of the society in such a way as to keep the directors in ignorance that the limit had been exceeded. In an action by a depositor against the directors to recover the amount of a deposit made after the limit of the borrowing powers had been reached, the Court held, affirming the decision of Mathew, J., that every director who was a member of the board when the deposit was received was personally liable for the amount so received. "The section," said Lord Halsbury, L. C., "deals with the case of the receipt, by a society constituted under the Act, of loans or deposits in excess of the limits prescribed by the Act, and purports to make the governing body personally liable for money so received. Let us see if the language used is to be limited as contended for by the appellants. It is said that, because the section speaks of the receipt by the directors or committee of management (which, I take it, is an alternative, in view of the fact that some societies have a board of directors and others a committee of management), this must be confined to such of the governing body as have in their individual capacity received the deposits. The first answer to this suggestion is that such a narrow construction would render the section inoperative. Directors do not receive in their individual capacity; they can only receive deposits through the society's ordinary channel of receipts, and they would receive excess loans or deposits

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in the same manner as others, in this case by the person who was authorized to receive on their behalf. The second observation which arises is, that if the construction contended for is to be placed on the section, one would expect to find words limiting its application to the governing body, 'or such one or more of them as shall have received such loans or deposits.' No such words are there, and although the liability is personal, the thing done is done on the authority of the governing body, and it is reasonable that the legislature should say that each member of the governing body should be liable for the act which that governing body had wrongfully permitted to be done. The thing contemplated is that the members of the governing body, either themselves and with knowledge, or by giving authority to others and without knowledge, have enabled that to be done which it was their duty as the governing body to prevent." The directors were therefore held liable under the section, but the learned judge who tried the case below was of opinion that they would have been equally liable on the ground of breach of warranty, quite apart from the statute (*h*).

Liability for money borrowed in excess of powers.

Money borrowed by directors in excess of the prescribed limits creates no debt against the society, and cannot therefore form the subject of a set-off (*i*). In one case it was even held that money so borrowed could not properly be repaid out of the society's assets (*j*),

(*h*) See *Cross* v. *Fisher*, [1892] 1 Q. B. p. 469; 65 L. T. 114; and the cases cited in notes (*m*) and (*n*), *post*, p. 139.

(*i*) *Birkbeck Building Society* v. *Birkbeck* (1913), 29 T. L. R. 218.

(*j*) *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (1885), 29 Ch. D. 902; 54 L. J. Ch. 1091; 53 L. T. 741.

but this decision has now been overruled by the House of Lords (*k*). The *quasi*-lender will, however, under the equitable doctrine of subrogation, be entitled to be repaid so much of the money lent as went to pay the legitimate debts and liabilities of the society, or in some cases to follow and recover his money by means of what is known as a "tracing order"; see as to this, *post*, p. 136 *et seq.*

Queensland.

In a case that occurred in Queensland the relevant statute authorized borrowing within certain specified limits, and provided that a person lending money to the society should not be bound to see that the society had not exceeded the limit of its borrowing powers. The rules (in accordance with the statute) authorized the directors to borrow to an amount not exceeding one year's income of the society. The directors borrowed in excess of this limit. It was held that, in the absence of any evidence that the lenders were aware that the society was exceeding its powers, the loans were good (*l*).

B. *Unincorporated Societies.*

Object of unincorporated society.

The purpose of an unincorporated building society, as defined by the Act of 1836, is that of raising, by the monthly or other subscriptions of the members, a stock or fund for the purpose of enabling each member to receive out of the funds the amount or value of his share or shares to erect or purchase one or more dwelling-house or dwelling houses, or other real or

(*k*) See *Sinclair* v. *Brougham*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 Sol. J. 302; 30 T. L. R. 315.

(*l*) *Re Bundaberg Permanent Building and Investment Society* (No. 1) (1898), 9 Queensland L. J. Rep. 87.

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leasehold estate, to be secured by way of mortgage to the society until the amount or value of the share or shares be fully repaid, with interest, and all fines or other payments incurred in respect thereof (*m*).

Money-lenders Act, 1900.

A society registered under the Act of 1836 is not included in the expression "money-lender," as used in the Money-lenders Act, 1900 (*n*).

Shares not to exceed 150*l*.

The shares must not exceed 150*l*. in value (*o*), though there is nothing to prevent persons from subscribing for more shares than one (*p*); and the subscriptions must not exceed 20*s*. per month per share (*q*).

Division of profits.

No member may receive from the funds of the society any interest or dividend by way of annual or other periodical profit upon his shares until the shares are realized or withdrawn (*r*).

Property of society is vested in trustees for the time being.

The property and assets of the society vest in the trustees for the time being without conveyance or assignment, except in the case of stocks and securities in the public funds, and the society sues and is sued in the name of the trustees. The trustees must, however, have the authority of the society for taking or defending any legal proceedings (*s*).

Power to make rules.

An unincorporated society may make rules for its government and guidance, as to the major part of the

(*m*) 6 & 7 Will. 4, c. 32, s. 1; the grammar of this section is imperfect.

(*n*) 63 & 64 Vict. c. 51, s. 6 (b).

(*o*) 6 & 7 Will. 4, c. 32, s. 1.

(*p*) *Morrison* v. *Glover* (1849), 4 Ex. 430; 19 L. J. Ex. 20; 14 L. T. (O. S.) 204; 14 J. P. 84; where Parke, B., said his *dictum* to the contrary in *Cutbill* v. *Kingdom* (1847), 1 Ex. 494; 17 L. J. Ex. 177, was incorrect.

(*q*) 6 & 7 Will. 4, c. 32, s. 1.

(*r*) 6 & 7 Will. 4, c. 32, s. 1.

(*s*) 10 Geo. 4, c. 56, s. 21; see as to this, *post*, p. 195.

members assembled together shall seem meet, "so as such rules shall not be repugnant to the express provisions of this Act, and to the general laws of the realm" (*t*). As to the power to make rules conferred by these words, see the judgment of the Earl of Selborne, L. C., in *Agnew* v. *Murray* (*u*); the remarks of Giffard, L. J., in *Laing* v. *Reed* (*v*); and the judgment of Jessel, M. R., in *Re Guardian Permanent Benefit Building Society* (*w*). "The only real and true limit of the rule-making power, as to a matter not governed by the general law of the realm or by any express prohibition in the statute, must be that pointed out by Giffard, L. J.; the power cannot be so exercised as to make the society a thing different from a benefit building society, formed for the purposes and in the manner defined by the Act" (*x*). Any rule that is contrary to the Act is of course invalid; the Act expressly says, "so as such rules shall not be repugnant to the express provisions of this Act;" and even apart from this, no rule could obviate or get rid of the effect of an Act of Parliament (*y*).

"Proper and wholesome rules and regulations."

(*t*) 6 & 7 Will. 4, c. 32, s. 1.

(*u*) (1884), 9 App. Cas. p. 538; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462.

(*v*) (1869), 5 Ch. 4; 39 L. J. Ch. 1; 18 W. R. 76; 21 L. T. 773; 34 J. P. 134.

(*w*) (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134.

(*x*) *Per* Lord Selborne, L. C., *Agnew* v. *Murray;* and see *Amalgamated Society of Railway Servants* v. *Osborne,* [1910] A. C. p. 96; 79 L. J. Ch. 87; 101 L. T. 787; 26 T. L. R. 177; 54 Sol. J. 215; 47 Sc. L. R. 613.

(*y*) *Re Bristol Athenæum* (1889), 43 Ch. D. p. 240; 59 L. J. Ch. 116; 38 W. R. 396; 61 L. T. 795; 1 Meg. 452; 6 T. L. R. 83; and see *Sibun* v. *Pearce* (1890), 44 Ch. D. 370; *Cullerne* v. *London and Suburban General Permanent Building Society,* cited *ante,* p. 57.

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Rules must be entered in a book.

The rules must be entered in a book kept by an officer of the society appointed for the purpose, which must be open at all seasonable times for the inspection of the members. The rules are binding on the members and depositors, and a copy of the transcript of the rules, examined with the original and proved to be a true copy, is evidence of the rules (*z*).

Alteration of rules.

Of course, no original rules can now be framed for an unincorporated society, but existing rules may be altered or rescinded. This can only be done at a general meeting of the members, convened by public notice, written or printed, signed by the secretary or president or other principal officer or clerk in pursuance of a requisition by seven or more members, which requisition and notice must be publicly read at the two usual meetings held next before the general meeting for the alteration or repeal, or by a committee nominated for the purpose at a general meeting of the members convened as aforesaid, and with the concurrence and approbation of three-fourths of the members present at the meeting, or of three-fourths of the committee so appointed (*a*). The officers of the society are bound to summon a meeting of the members upon a requisition to that effect being duly made to them for this purpose; they have no discretion in the matter (*b*).

(*z*) 10 Geo. 4, c. 56, ss. 7 and 8. In *R.* v. *Boynes* (1843), 1 Car. & K. 65, it was held that to give evidence of the transcript of the rules of a benefit society enrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the copy of *all* the rules with the transcript.

(*a*) 10 Geo. 4, c. 56, s. 9.

(*b*) *R.* v. *Aldham and United Parishes Insurance Society* (1851), 21 L. J. Q. B. 1; 16 J. P. 149; *S. C. nom. R.* v. *Bannatyne*, 18 L. T. (O. S.) 74; overruling *R.* v. *Bannatyne* (1851), 2 L. M. & P. 213; 20 L. J. Q. B. 210.

The mode of altering the rules is as follows:—

Mode of altering rules.

Two copies of the proposed alteration fairly written on paper or parchment, signed by three members and countersigned by the clerk or secretary, must be sent to the registrar, accompanied by an affidavit by the clerk or secretary, or one of the officers of the society, that the provisions of the Act under which the rules of the society have been enrolled have been duly complied with (*c*).

Duty of registrar.

The registrar then ascertains whether the rules are in conformity with law and are calculated to carry into effect the intentions of the parties, advising with the clerk or secretary if required. If he is not prepared to certify the rules, he must point out in what respect they are repugnant to law or to the Acts, and on his definite refusal to certify, the society may submit the rule or rules in question to the Court of Quarter Sessions, with the registrar's reasons in writing for rejection or disapproval of them, and the justices may then, if they think fit, confirm and allow such rules notwithstanding the registrar's rejection or disapproval (*d*).

Certificate.

If, on the other hand, the registrar is willing to certify, both copies are sealed with the seal of the Central Office (or signed, as the case may be, in Scotland or Ireland by the assistant registrar), and one copy is returned to the society and the other retained (*e*).

Fee.

A fee of one guinea is payable to the registrar for every alteration of rules certified, unless a fee has already been paid in respect of the same rules within

(*c*) 4 & 5 Will. 4, c. 40, s. 4.
(*d*) 10 Geo. 4, c. 56, s. 5.
(*e*) *Ibid.*

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three years, or the alteration is sent accompanied by an affidavit of being a copy of any rules, alterations, or amendments of rules of any other society already enrolled. In the latter case, the registrar is bound to certify (*f*).

As to how far the certificate of the registrar is conclusive of the validity of a rule, see *ante*, p. 51.

Schedule of forms.

The society may, in and by its rules, describe the forms of conveyance, mortgage, transfer, agreement, bond, or other instrument which may be necessary for carrying its purposes into execution, which forms must be specified in a schedule to be annexed to the rules (*g*).

Societies may alter place of meeting.

The society may alter its place of meeting whenever it may consider it necessary, upon giving notice in writing to the registrar, within seven days before or after removal, signed by the secretary or other principal officer and also by three or more of the members of the society. It cannot, however, remove its place of meeting out of the county in which, for the purposes of its business, it was originally established (*h*).

General meeting.

Where the officers of a friendly society took upon themselves to convene a general meeting of the society at Manchester, when according to the rules the place of business was at Liverpool, the Court of Queen's Bench held that new rules adopted at the meeting were entirely null and void (*i*).

Investment of surplus funds.

The surplus funds of the society may, with its consent, to be testified in manner directed by the rules,

(*f*) 4 & 5 Will. 4, c. 40, s. 6.
(*g*) 6 & 7 Will. 4, c. 32, s. 3.
(*h*) 10 Geo. 4, c. 56, s. 10; *R.* v. *Registrar of Friendly Societies* (1852), 16 J. P. 613; 19 L. T. (O. S.) 182.
(*i*) *R.* v. *Tidd Pratt* (1865), 6 B. & S. 672; 29 J. P. 388.

be from time to time laid out on real or heritable securities or heritable property (such securities being taken in the name of the treasurer or trustee for the time being), or invested in the public stocks or funds, or government securities, or in any of the chartered banks in Scotland, or in the bank of the Commercial Banking Company of Scotland, and not otherwise, in the name of the treasurer or trustee, with power to vary investments; and the dividends, interests, and proceeds arising from the moneys so laid out or invested must from time to time be brought to account by the treasurer or trustee, and applied for the use of the society according to the rules (*j*).

Savings banks.

Investments in any savings bank, or with the Commissioners for the Reduction of the National Debt, are expressly forbidden (*k*).

Purchase of land.

An unincorporated building society may therefore invest its surplus funds in the purchase of real estate; though such a society will not be allowed to convert itself into a freehold land society by speculating in land beyond this limit (*l*).

Ex parte Lever.

In one case a building society from the outset abandoned its legitimate business and proceeded to act as a land society. The practice was for the society to purchase a large piece of land and divide it into lots of a convenient size; and any person who was desirous

(*j*) 10 Geo. 4, c. 56, s. 13.
(*k*) 6 & 7 Will. 4, c. 32, s. 6.
(*l*) *Grimes* v. *Harrison* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 5 Jur. N. S. 528; 33 L. T. (O. S.) 115; 23 J. P. 421; *Mullock* v. *Jenkins* (1851), 14 Beav. 628; 21 L. J. Ch. 65; 18 L. T. (O. S.) 203; *Re Kent Benefit Building Society* (1861), 1 Dr. & Sm. 417; 30 L. J. Ch. 785; 7 Jur N. S. 1045; 9 W. R. 686; 4 L. T. 610; 25 J. P. 805. The power of an incorporated society to hold land is strictly limited; see *ante*, p. 66.

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of purchasing a lot became a member of the society and took shares to the requisite amount, receiving a conveyance from the trustees as soon as his shares were paid up in full. It was understood, however, that these purchases were irregular, and accordingly two deeds of indemnity were prepared; one to the trustees of the society, and the other to the president and officers, and each member was required to execute these deeds on receiving his conveyance. For convenience' sake these conveyances were generally executed in batches, when several members had paid in full and were ready to take up their deeds. The society got into difficulties, and a winding-up order was made after one of the members had paid up his shares in full and the trustees had executed his conveyance, but before the conveyance had been handed over to him or he had executed the indemnity deeds. Under these circumstances the member applied to the Court for an order on the liquidator to hand over the conveyance. The liquidator claimed a lien on the property for the purchase-money which had been expended on it. Mr. Justice Stirling held, on the evidence, that the execution of the conveyance was conditional on the execution by the member of the indemnity deeds, and that as these had not been executed nothing passed by the conveyance. The learned judge held further that the purchase of the land by the society was wholly *ultra vires*, and that under the circumstances he could not authorize the liquidator either to hand over the conveyance or to permit the member to execute the deeds of indemnity, and that matters must therefore remain as they were (*m*).

(*m*) *Re North Staffordshire Working Men's Building Society, Ex parte Lever*, November 15th, 1887.

Advances to non-members.

Unauthorized investment.

A society may lend its surplus funds on real security either to strangers (*n*) or to members of the society (*o*).

Where the directors of a building society had deposited money of the society with a finance company in a manner not authorized by the rules, the Court held that it was trust money in the hands of the company, and might be recovered accordingly; see *Hardy* v. *Metropolitan Land and Finance Co.* (*p*). In that case the manager and directors of both concerns were practically the same persons, and after part of the money deposited had been repaid to the society, the company gave the manager a cheque for the balance, which he misappropriated. The trustees of the society, with the sanction of the directors, though they were not made parties, thereupon filed a bill against the company to recover the money, and it was held that they were entitled to do so, on the ground that the cheque was given to the manager as the agent of the company, and as he had never paid it over to the building society, the money was still in the hands of the defendants, and being trust money they were liable to repay it, whether they had notice of the breach of trust or not; and see also *Re Coltman* (*q*). In the ordinary sense of the words, however, the funds of a building society are not trust funds, and cannot, therefore, in the case of an unincorporated society, be invested as such under the Trustee Act, 1893 (*r*).

(*n*) *Cutbill* v. *Kingdom* (1847), 1 Ex. 494; 17 L. J. Ex. 177.
(*o*) *Morrison* v. *Glover* (1849), 4 Ex. 430; 19 L. J. Ex. 20; 14 L. T. (O. S.) 204; 14 J. P. 84.
(*p*) (1872), 7 Ch. 427; 41 L. J. Ch. 257; 20 W. R. 425; 26 L. T. 407.
(*q*) (1881), 19 Ch. D. 64; 51 L. J. Ch. 3; 30 W. R. 342; 45 L. T. 392, cited *ante*, p. 84.
(*r*) *Re National Permanent Mutual Benefit Building Society*

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Annual account and statement.

An unincorporated society is under the same obligation to make out, and furnish copies of, an annual statement of its accounts, and the society, its members and officers, are liable to the same penalties for default in so doing, as in the case of an incorporated society (*s*), as to which see *ante*, p. 88 *et seq*. The society is not, however, required to make out the account in the form prescribed for the use of incorporated societies, as sect. 2 of the Act of 1894 does not apply to unincorporated societies. A special form for the use of these latter societies has accordingly been settled by the registrar, which may be obtained on application to him. Under the provisions of the old Friendly Societies Act of 1829 (*t*) the account must be attested by two members of the society as auditors, and counter-signed by the secretary or clerk.

Audited accounts may be impeached on the ground of fraud.

In *Holgate* v. *Shutt* (*u*), one of the rules of the society provided that the accounts should be audited every year "by auditors appointed by the society," and that after the accounts had been audited and signed the treasurer should not be answerable for mistakes, omissions, or errors afterwards proved in the accounts. In an action by members against the treasurer, the Court held that though the audited accounts must be received as *primâ facie* evidence, the rule did not prevent the members from impeaching the accounts on the ground of fraud. The plaintiffs then raised a

(1889), 43 Ch. D. p. 434; 59 L. J. Ch. 403; 38 W. R. 475; 62 L. T. 596—North, J. This decision no longer applies to the case of an incorporated society; see *ante*, p. 78.

(*s*) Building Societies Act, 1894, s. 25; Building Societies Act, 1874, s. 40.

(*t*) 10 Geo. 4, c. 56, s. 33.

(*u*) (1884), 27 Ch. D. 111; 53 L. J. Ch. 774; 32 W. R. 773; 51 L. T. 433.

further point, viz., that the accounts having been audited by one person only, who was not a member of the society, the accounts were not even *primâ facie* evidence for the defendant. The Court was of opinion that the accounts had not been audited in accordance with the Act and rules, but held that the defendant was not precluded from showing that the audited account ought to be treated as a settled account upon other grounds (*v*).

Ratification of acts of directors.

Where the directors of a society which had no power to borrow had been allowed by its bankers to make large overdrafts secured by a lien on the society's deeds, it was held by the Court of Appeal that the fact that annual balance sheets showing the amounts due to the bankers had been sent to all the members of the society, and adopted at the annual meetings, was no ratification of what the directors had done; for such ratification could not be implied from the members merely seeing and not questioning the accounts which had been sent them, and the acts of the directors being *ultra vires*, no ratification by the majority could even in general meeting bind the minority present, or any absent member (*w*).

Exemption from stamp duties.

No copy of rules, power, warrant or letter of attorney granted or to be granted by any person as trustee of any unincorporated society for the transfer of any share in the public funds standing in the name of such

(*v*) *Holgate* v. *Shutt* (1884), 28 Ch. D. 111; 54 L. J. Ch. 436; 51 L. T. 673; 49 J. P. 228.

(*w*) *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (1885), 29 Ch. D. 902; 54 L. J. Ch. 1091; 53 L. T. 741; distinguished in *Union Bank of Australia* v. *South Canterbury Building and Investment Co.* (1894), 13 N. Z. L. R. 489.

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trustee, nor any receipts given for any dividend in any public stock or fund or interest of exchequer bills, nor any receipt, nor any entry in any book of receipt, for money deposited in the funds of any such society, nor for any money received by any member, his or her executors or administrators, assigns or attorneys, from the funds of such society, nor any bond nor other security to be given to or on account of any such society, or by the treasurer or trustee or any officer thereof, nor any draft or order, nor any form of assurance, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever required or authorized to be given, issued, signed, made, or produced in pursuance of the Act 10 Geo. 4, c. 56, is subject or liable to or chargeable with any stamp duty whatsoever (*x*).

Stamps on mortgages.

It was decided in *Walker* v. *Giles* (*y*) and *Barnard* v. *Pilsworth* (*z*), that mortgages to a building society came within the above provisions and were exempt from duty; and the same was held, in *Thorn* v. *Croft* (*a*), by Wood, V.-C., who extended the decision to the case of mortgages to the society by persons not members of it.

Stamp Act, 1891, s. 89.

The Stamp Act, 1891 (*b*), s. 89 (January 1, 1892), now provides as follows, in substitution for 31 & 32

(*x*) 10 Geo. 4, c. 56, s. 37; and see also 6 & 7 Will. 4, c. 32, s. 8.
(*y*) (1848), 6 C. B. 662; 18 L. J. C. P. 323; 13 Jur. 588; 13 L. T. (O. S.) 209.
(*z*) (1849), 6 C. B. 698, n.; 18 L. J. C. P. 330, n.; 14 L. T. (O. S.) 132.
(*a*) (1866), 3 Eq. 193; 36 L. J. Ch. 68; 15 W. R. 54; 15 L. T. 205; 31 J. P. 356.
(*b*) 54 & 55 Vict. c. 39.

Vict. c. 124, s. 11 (July 31, 1868), to the same effect: —"The exemption from stamp duty conferred by the Act of the Session held in the sixth and seventh years of King William the Fourth, chapter thirty-two, for the regulation of benefit building societies shall not extend to any mortgage made after the thirty-first day of July, one thousand eight hundred and sixty-eight, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding five hundred pounds." CHAP. V.

In *Williams* v. *Hayward* (*c*), a mortgage to a building society executed before the rules had been certified and deposited, though this was done subsequently, was held to be exempt from stamp duty.

A reconveyance, whether by deed or statutory receipt, is exempt from duty; see *ante*, p. 95. Reconveyance.

In *Attorney-General* v. *Phillips* (*d*), a member mortgaged a cottage to the society to secure an advance. The society entered into possession, and received rent from the tenant of the mortgaged premises, for which they gave him a receipt in the following form:— Receipt.

"Received of Mr. G. C. Knight twelve pounds, rent of premises, Barnhove Cottage, East Moulsey, due at Michaelmas, 1870.

"For the Trustees of the Society,

"£12. "HENRY J. PHILLIPS, *Secretary*."

The Court of Exchequer held that this was simply a receipt between landlord and tenant, and was liable to stamp duty.

(*c*) (1855), 22 Beav. 220; 25 L. J. Ch. 289; 1 Jur. N. S. 1128; 26 L. T. (O. S.) 134; 19 J. P. 788.
(*d*) (1871), 24 L. T. 832; 19 W. R. 1146.

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"Bond nor other security."

In *Re Royal Liver Friendly Society* (*e*), a case on the construction of the Friendly Societies Act, 1855, s. 37, which is almost identical with the above provisions, except that the words "nor other security" are omitted after the word "bond,"—Martin, B., said:—"My impression is that the word 'bond,' which occurs in both the earlier and the present section, refers, not to a loan or investment of the society's funds in or upon bonds, such as the Harbour Bonds of the Mersey Docks, but to bonds given, whether with or without sureties, by clerks, agents to receive money, and others, as security for their duly accounting, or otherwise discharging the functions of their office. That, I think, also, was the nature of the 'security' mentioned in the earlier Act [10 Geo. 4, c. 56]; but a more extensive meaning having been attributed to it, the word was afterwards omitted." In *Carter* v. *Bond* (*ee*) it was held under the old Friendly Societies Act, 33 Geo. 3, c. 54, that a bond conditioned for the production of a box containing the subscriptions of a friendly society did not require to be stamped.

"Draft or order."

Where a building society paid withdrawing members the amounts due to them by drafts to bearer drawn by the member, and made half-yearly payments of interest to members of the society in respect of their shares by similar drafts, both were held liable to stamp duty (*f*),

(*e*) (1870), L. R. 5 Ex. 78; *S. C. nom. Trustees of the Royal Liver Friendly Society* v. *Commissioners of Inland Revenue*, 39 L. J. Ex. 37; 18 W. R. 349; 21 L. T. 721. This case and *A.-G.* v. *Phillips* have been followed in New Zealand; see *Willis* v. *Ongley* (1915), 34 N. Z. L. R. 967.

(*ee*) (1803), 4 Esp. 253.

(*f*) *Att.-Gen.* v. *Gilpin* (1871), L. R. 6 Ex. 193; 40 L. J. Ex. 134; 19 W. R. 1027.

the Court considering that it was in reality a banking transaction and not a transaction within the operations of a building society.

Power to borrow money.

The right of an unincorporated society to borrow money, a point on which the Act of 1836 is silent, depends on the rules, which may contain an unlimited power to borrow; or may contain no power to borrow at all; or may contain a limited power only. It will be convenient to consider these cases separately.

Where the rules contain an unlimited power to borrow.

1. For a long time an opinion prevailed that, though a rule authorizing the directors to borrow money for the purposes of the society to a limited extent was good, a rule giving them an unlimited power to borrow for such purposes was illegal and void, as being contrary to the scope and intent of the statute (*g*). The House of Lords, however, subsequently decided, in *Agnew* v. *Murray* (*h*), that this idea was erroneous, and that a rule authorizing directors to borrow money for the purposes of the society, without any limit being expressed as to the amount, was perfectly good, and the loans contracted under it valid. In that case the 32nd rule of the society was as follows:—"The trustees or directors for the time being of this society may, from time to time as occasion may require, borrow and take

(*g*) *Laing* v. *Reed* (1869), 5 Ch. p. 8; 39 L. J. Ch. 1; 18 W. R. 76; 21 L. T. 773; 34 J. P. 134; *Hill's Case* (1870), 9 Eq. 605; 39 L. J. Ch. 628; 18 W. R. 967; 22 L. T. 777; 34 J. P. 532; *Re Professional, Commercial, and Industrial Permanent Benefit Building Society* (1871), 6 Ch. 856; 19 W. R. 1153; 25 L. T. 397; *Re Guardian Permanent Benefit Building Society, Calvert's Case* (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134.

(*h*) (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462, reversing the decision of the Court of Appeal in *Calvert's Case*, from which *Agnew* v. *Murray* was an appeal.

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up at interest any sum or sums of money from the society's banker, or from any banker, or from any other person or persons; and any borrowed money shall be a first charge on the funds and property of the society. And in case the trustees or directors shall at any time give their joint and several promissory note or other security for money borrowed for and on behalf of the society, then and in such case the persons giving the security shall be indemnified by the society, and the funds and property of the society shall be held subject and liable to the repayment of the borrowed moneys, the borrowed moneys being always deemed a first charge on the society's funds and property." Under this rule the directors borrowed large sums for the proper purposes of the society, and deposited with the lenders, as security, the title deeds of properties which had been mortgaged to the society by advanced members. The society was ordered to be wound up. The House of Lords held that the rule was valid, and that the lenders were entitled in the winding-up to payment out of the assets after satisfaction of the creditors other than creditors for loans (*i*) and in priority to the claims of all shareholders or members. As between the different loan creditors themselves, however, it was held that there could be no priorities, for that the true meaning of the rule under which the loans were contracted was that all the moneys borrowed under it were to have

Provision that borrowed money shall be a first charge.

(*i*) This point was not argued; the outside debts were only trifling and were by arrangement paid first; see 9 App. Cas. p. 542. In the absence of any such arrangement, ordinary creditors and loan creditors would be paid rateably; see *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. p. 373.

the benefit, equally and *pari passu*, of a first charge upon the general funds and property of the society, and that it would be inconsistent with this to allow the lenders to compete with each other by taking special securities upon particular properties; and see also to the same effect *Small* v. *Smith* (*j*), where the words of the rule were, "The sums so borrowed shall form a preferable charge against the funds, claims, and effects of the society."

Priority of ordinary creditors.

In a case that occurred in New Zealand it was held that ordinary creditors took in priority both to members whose shares had matured, and also to members who had given notices of withdrawal which had matured prior to the commencement of the liquidation of the society, but that they were not entitled to interest (*k*).

Deposits.

In another case, the first rule of the society declared that it was established "for the purpose of raising by monthly subscriptions and deposits on loans a fund to make advances to members of the value of their shares, to enable them to erect or purchase one or more house or houses," &c.; and a subsequent rule provided that the directors should meet at specified times "for the purpose of conducting the business of the society." At a meeting of directors, it was resolved that the directors might receive deposits of money on debentures; and under that resolution they received loans from persons not otherwise members. On the society being wound up, it was held that the first rule sufficiently expressed

(*j*) (1884), 10 App. Cas. p. 131; *S. C. nom. Shiell's Trustees* v. *Scottish Property Investment Society, in Liquidation*, 12 Rettie (H. L.), 14; 22 Sc. L. R. 139.

(*k*) *Re Auckland Permanent Co-operative Building and Investment Society* (1899), 17 N. Z. L. R. 634.

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the power to receive deposits on loan, and that the lenders were outside creditors, and entitled to be paid in priority to the members of all classes, including those who had given notice of withdrawal before the commencement of the winding-up (*l*).

Members not personally liable for money borrowed.

But no rule similar in its terms to those in the above cases would enable the directors to make the members of the society personally liable for the money borrowed. Thus, in *Murray* v. *Scott* (*m*), the Earl of Selborne, L. C., speaking of the rule as to borrowing, says: "It does not authorize the trustees or directors to pledge in any way the personal credit of any individual members of the society (unless, indeed, they think fit, by way of security only, to pledge their own); it expressly makes all borrowed money 'a first charge on the funds and property of the society,' of which the base is necessarily the total amount of the contributions of members; and the creditors can have no recourse except against such funds and property;" and see also the remarks of Lord Blackburn, 9 App. Cas. pp. 549, 550. If any rule did in terms purport to enable the directors to pledge the individual credit of the members to persons lending money to the society, the rule would to that extent be *ultra vires*, as being inconsistent with the nature of a building society under the Act (*n*), and

(*l*) *Re Mutual Aid Permanent Benefit Building Society* (1885), 29 Ch. D. 182; 54 L. J. Ch. 493; 33 W. R. 575; 52 L. T. 406; affirmed on appeal, 30 Ch. D. 434; 55 L. J. Ch. 111; 34 W. R. 143; 53 L. T. 802.

(*m*) 9 App. Cas. p. 539. See the remarks of Buckley, L. J., in *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. p. 230.

(*n*) *Murray* v. *Scott* (1884), 9 App. Cas. p. 553; *Re Mutual Aid Permanent Benefit Building Society* (1885), 30 Ch. D. 434; 55 L. J. Ch. 111; 34 W. R. 143; 53 L. T. 802.

the members would only be liable to the extent of the amounts payable by them under the rules (*o*).

Power confined to borrowing for proper objects.

A power to borrow, however, though unlimited in point of amount, must be confined to borrowing for the proper objects of the society. Accordingly, where persons lent money to a society with notice that the money was borrowed in the normal course and for the purposes of a banking business and not for the legitimate purposes of the society, it was held that they could not rely on the borrowing powers conferred by the society's rules as validating the loans (*p*). On the other hand, if a society borrows money intending, to the knowledge of the lender, to apply it to an illegitimate purpose but in fact applies it to the legitimate purposes of the society, the loan, it seems, will be good (*q*).

Where the rules contain no power to borrow.

2. An unincorporated society, however, has no power to borrow money unless its rules authorize it so to do (*r*); though the power to borrow need not be express, it is sufficient that borrowing is properly incident to the course and conduct of the business of the society for its proper purposes (*s*). If it could be shown that the

(*o*) *Re West London and General Permanent Benefit Building Society,* [1894] 2 Ch. 352; 63 L. J. Ch. 506; 42 W. R. 535; 70 L. T. 796.

(*p*) *Sinclair* v. *Brougham,* [1914] A. C. 398; 83 L. J. Ch. 465; 111 L .T. 1; 30 T. L. R. 315; 58 Sol. J. 302, the *Birkbeck Case.*

(*q*) *Ibid.,* [1914] A. C. p. 446, *per* Lord Parker of Waddington.

(*r*) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. 309; 18 W. R. 388; 22 L. T. 284; 34 J. P. 341; *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; 29 W. R. 529; 44 L. T. 449; *Cunliffe Brooks & Co.* v. *Blackburn Benefit Building Society* (1884), 9 App. Cas. 857; 54 L. J. Ch. 376; 33 W. R. 309; 52 L. T. 225; affirming *S. C.* below, 22 Ch. D. 61; 52 L. J. Ch. 92; 31 W. R. 98; 48 L. T. 33.

(*s*) *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1882), 22 Ch. D. p. 70, *per* Lord Selborne, L. C.

CHAP. V. course of business authorized by the rules was such as to give, as incidental to it, a power to borrow, it would be authorized, though not expressly authorized (*t*). In the *Blackburn Case* the facts were as follows:—The society, whose rules contained no power to borrow, was allowed by its bankers to overdraw its account to a large amount. In 1876 a memorandum was signed by the officers of the society, and confirmed by the directors, stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody, but as a security for the balance from time to time. In 1881 an order for winding-up the society was made, and the official liquidators brought an action to recover these deeds, which the bankers claimed to retain as security for the balance of their account. No evidence was given as to the application of the money which was drawn out by the society; but it was admitted that some part was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property. Under these circumstances the Court of Appeal (Selborne, L. C., Jessel, M. R., and Cotton, L. J.) held (1) that the overdrafts were *ultra vires*, being a borrowing not authorized by the rules and not properly incident to the course and conduct of the society's business for its proper purposes; and that the bankers were consequently not creditors of the society in respect of the overdrafts; (2) that the bankers were nevertheless entitled under the equitable doctrine of subrogation to

(*t*) *Per* Lord Blackburn, in *Cunliffe Brooks & Co.* v. *Blackburn Benefit Building Society*, 9 App. Cas. p. 865.

hold the deeds as a security for repayment of so much of the moneys advanced by them as had been applied in payment of the debts and liabilities of the society properly payable and had not been repaid, but not including payments to withdrawing members; (3) that the burden of proving how much this was lay on the bankers; and (4) that in satisfying that burden the bankers could not have the benefit of the rule in *Clayton's Case* (*u*), nor of the doctrine that a pass-book passing to and fro is evidence of a stated and settled account (*v*). The Court made an order accordingly, directing inquiries, with a declaration that in making the inquiries the bankers were to be charged with all sums received by them on account of the society, since it ceased to have any balance to its credit with the bankers, and that they were not to be allowed any sums advanced by them since that date which were applied in making payments to withdrawing members or otherwise than in paying such debts and liabilities of the society as aforesaid. On an appeal by the bankers alone the House of Lords expressed no opinion upon the question of payments to withdrawing members, or the bankers' right to hold the securities, but held that in other respects the decision and order of the Court of Appeal were right.

Blackburn Society v. *Cunliffe Brooks & Co.*

The liquidators then went further and brought an action against the bankers to recover all moneys which had been paid to them by the society and applied by

(*u*) (1816), 1 Mer. 572.

(*v*) See as to this, *Kepitigalla Rubber Estates* v. *The National Bank of India*, [1909] 2 K. B. 1010; 78 L. J. K. B. 964; 100 L. T. 516; 25 T. L. R. 402; 14 Com. Cas. 116; 16 Mans. 234; 53 Sol. J. 377.

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the bankers in discharge of their loan, and the Court of Appeal held that they were entitled to recover (*w*); but this decision has since been disapproved by the House of Lords and must be taken to be overruled (*x*).

Owen v. *Roberts.*

In *Owen* v. *Roberts* (*y*), which was a redemption action brought by advanced members of a terminating society against the trustees, who had borrowed money without authority, the Court made a declaration that if any of the officers of the society had made payments for which the society was liable, there not being any moneys of the society out of which such payments could be made, they were entitled to stand in the place of the persons to whom such payments were made, and to maintain a claim against the society for the amount of such payments.

Subrogation not confined to previously existing liabilities.

The benefit of this equitable doctrine of subrogation is not confined to the amount of debts and liabilities existing at the time of the advance, but extends to debts and liabilities accruing subsequently to the advance, if paid off out of it; the test, it has been said, is, Has the transaction really added to the liabilities of the society? If the amount of its liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of creditor, there is no substantial borrowing in the result so far as relates to the position of the society (*z*). The fact that the

(*w*) *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (1885), 29 Ch. D. 902; 54 L. J. Ch. 1091; 53 L. T. 741.

(*x*) See *Sinclair* v. *Brougham,* [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. J. 302.

(*y*) (1887), 57 L. T. 81.

(*z*) *Baroness Wenlock* v. *River Dee Company* (1887), 19 Q. B. D. 155; 56 L. J. Q. B. 589; 35 W. R. 822; 57 L. T. 320; *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1882), 22

quasi lender advanced his money with notice that there was no power to borrow will not prevent him from thus recovering it (*a*).

Right of subrogation where premium paid for advance.

In working out this equity of subrogation so as to give the *quasi* lender the benefit of any advance that may have been made by the society by means of the borrowed money, any premium that the society may have obtained for the advance is to be disregarded. Thus, where the borrowing member paid a premium of 10*l.* for every 100*l.* advanced, so that he in fact received only 90*l.* with an obligation to pay 100*l.*, it was held that the *quasi* creditor for loans in excess of the borrowing powers of the society must be allowed the benefit of the full 100*l.*, without any deduction on account of the premium (*b*).

No subrogation to rights of creditors.

But although, where money is borrowed *ultra vires*, the lender, so far as his money is applied in the discharge of legal debts and liabilities of the *quasi* borrower, is entitled to have the loan treated as valid, this is the extent of his right, and he will not be subrogated to any securities or priorities of the creditors who are paid by means of his money; see *Re Wrexham, Mold, and Connah's Quay Railway* (*c*), where the nature and

Ch. D. p. 71; *Re East and West India Dock Co.* (1891), 7 T. L. R. 623; *Re Lough Neagh Ship Co.*, [1895] 1 Ir. R. 533; *Liquidators of Cape of Good Hope Permanent Land Building and Investment Society* v. *Standard Bank* (1889), 16 S. C. R. 325; *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103; 75 L. J. K. B. 120; 54 W. R. 293; 94 L. T. 150.

(*a*) *Reversion Fund and Insurance Co.* v. *Maison Cosway*, [1913] 1 K. B. 364; 82 L. J. K. B. 512; 108 L. T. 87; 57 Sol. J. 144.

(*b*) *Neath Permanent Benefit Building Society* v. *Luce* (1889), 43 Ch. D. 158; 59 L. J. Ch. 3; 38 W. R. 122; 61 L. T. 611.

(*c*) [1898] 2 Ch. 663; 68 L. J. Ch. 28; 79 L. T. 463; [1899] 1 Ch. 205, 440; 68 L. J. Ch. 270; 47 W. R. 464; 80 L. T. 130; 6 Manson, 218; 15 T. L. R. 13, 122, 209.

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limits of the doctrine of subrogation were considered by Romer, J., and the Court of Appeal.

Recovery by means of a "tracing order."

Subrogation is not the only remedy open to an *ultra vires* lender; he may also in some cases have the benefit of what is called a "tracing order," under which he can recover his money so long as he can identify it; or he may claim it as "trust money." The position of such a lender has been thus described by Lord Parker:—

"Accepting the principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies. On this point the result of the authorities may be stated as follows: First, it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied. There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to the like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off. See the case of *Blackburn and District Benefit Building*

Society v. *Cunliffe Brooks & Co.* (*d*), the case of *Wenlock* v. *River Dee Co.* (*e*), and the case of *Wrexham, Mold, and Connah's Quay Railway Co.* (*f*). It is still open to your Lordships' House to adopt either view, should the question actually come up for determination. Secondly, it appears to be also well settled that the lender in an *ultra vires* loan transaction has a right to what is known as a tracing order. A company or other statutory association cannot by itself or through an agent be party to an *ultra vires* act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, the money borrowed is in their hands the property of the lender. At law, therefore, the lender can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect

(*d*) (1882), 22 Ch. D. 61; 9 App. Cas. 857.
(*e*) (1885), 10 App. Cas. 354.
(*f*) [1898] 2 Ch. 663; [1899] 1 Ch. 440.

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rights of property, though not recognized as such by the common law" (*g*).

"Money had and received."

A lender to a society which has no power to borrow cannot recover his money by an action for money had and received (*h*). Where, however, a customer of a society which had been carrying on an *ultra vires* banking business had been allowed to overdraw his account, in other words, had borrowed money from the society, the liquidator, on the society being wound up, recovered the amount of the overdraft by an action in this form (*i*); but this was prior to the case of *Sinclair* v. *Brougham* in the same winding-up, and it may therefore be a question whether the decision is now good law.

Interest.

Where an interest-bearing debt has been paid off with the borrowed money the lender stands in the shoes of the creditor with regard to the interest as well as the principal (*j*).

Where a loan had been contracted when the society had no power to borrow, it was held in one case that no security subsequently given for it after borrowing powers had been obtained would be of any avail (*k*), but this decision cannot now be regarded as law (*l*).

Personal liability of directors

In some cases the lender may have a personal remedy against the directors, for it is well settled that an agent

(*g*) *Sinclair* v. *Brougham,* [1914] A. C. pp. 440 *et seq.*

(*h*) *Sinclair* v. *Brougham.*

(*i*) *Brougham* v. *Dwyer* (1913), 108 L. T. 504; 29 T. L. R. 234.

(*j*) *Re Beavan,* [1912] 1 Ch. 196; 81 L. J. Ch. 113; 105 L. T. 784.

(*k*) *Ex parte Watson* (1888), 21 Q. B. D. 301; 57 L. J. Q. B. 609; 36 W. R. 829; 59 L. T. 401; 52 J. P. 742.

(*l*) See *Sinclair* v. *Brougham,* [1914] A. C. 398, 426; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. J. 302.

for money borrowed without authority.

who represents himself to have authority, when in fact he has none, is answerable to those who are deceived by him for the breach of an implied warranty (*m*); and directors of a building society who have obtained money on a representation that they had authority to borrow on behalf of the society have been held to be within this principle, and may be sued for damages if it subsequently prove that there was in fact no such power, and that the society is not liable for the money (*n*). If the society is insolvent, however, the damages in such a case would possibly be *nil* (*o*).

Loans contracted between November 2nd, 1874,

It must be remembered that between November 2nd, 1874, and April 22nd, 1875, societies, although unincorporated, enjoyed the borrowing powers conferred by

(*m*) *Collen* v. *Wright* (1857), 7 E. & B. 301; affd. 8 E. & B. 647; 26 L. J. Q. B. 215; 6 W. R. 123; 4 Jur. N. S. 357; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121; 22 L. T. 388; *Gosling* v. *Gaskell,* [1897] A. C. p. 592, *per* Lord Herschell; 66 L. J. Q. B. 848; 77 L. T. 314; *Halbot* v. *Lens,* [1901] 1 Ch. 344; 70 L. J. Ch. 125; 49 W. R. 214; 83 L. T. 702; *Oliver* v. *Bank of England,* [1902] 1 Ch. 610; 71 L. J. Ch. 388; 50 W. R. 340; 86 L. T. 248; 7 Com. Cas. 89; 18 T. L. R. 341; 46 Sol. J. 296.

(*n*) *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145, explained by Mellish, L. J., in 7 Ch. 801; *Weeks* v. *Propert* (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; 21 W. R. 676; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; 29 W. R. 529; 44 L. T. 449; *S. C.* below, 5 C. P. D. 331; 49 L. J. C. P. 796; 29 W. R. 153; *Cross* v. *Fisher* (1886), 65 L. T. 114; *Firbank's Executors* v. *Humphreys,* 18 Q. B. D. 54; 56 L. J. Q. B. 57; 35 W. R. 92; 56 L. T. 36; *Beattie* v. *Lord Ebury* (1872), 7 Ch. 777; 41 L. J. Ch. 804; 20 W. R. 994; 27 L. T. 398; L. R. 7 H. L. 102; 44 L. J. Ch. 20; 22 W. R. 897; 30 L. T. 581; *West London Commercial Bank* v. *Kitson* (1883), 12 Q. B. D. 157; affd. on appeal, 13 Q. B. D. 360; 53 L. J. Q. B. 218, 345; 32 W. R. 431, 757; 50 L. T. 208, 656.

(*o*) *Per* Blackburn, J., L. R. 6 Q. B. p. 729; and see further, as to the measure of damages, *Re National Coffee Palace Co.* (1883), 24 Ch. D. 367; 53 L. J. Ch. 57; 32 W. R. 236; 50 L. T. 38; *Meek* v. *Wendt* (1888), 21 Q. B. D. 126.

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the Building Societies Act, 1874, s. 15; loans contracted during the interval by a society without any express borrowing powers were consequently valid, provided they were not in excess of the limits prescribed by the section; see Building Societies Act, 1874, s. 8.

Limited power must not be exceeded.

3. If the rules of the society contain a limited power to borrow, it must be strictly pursued, and if the limits of the power are exceeded the loan will create no liability against the society; thus, where the rules authorized the committee to obtain loans solely for the purpose of making advances to members, and the committee borrowed money for general purposes and in order to pay debts, James, V.-C., held that the society were not liable (*p*). Moreover, any borrowing power, though perfectly general in terms and without expressed limit as to amount, will be construed as a power to borrow for the proper purposes of the society only, and if the lender has notice that his money is being borrowed for an *ultra vires* purpose there is no legal debt, and he cannot recover (*q*). If, however, he has no such notice the loan would seem to be good, even though the society should subsequently misapply the money (*r*). In one case, Bacon, V.-C., refused to order the lender to give up deeds which had been deposited

(*p*) *Moye* v. *Sparrow* (1870), 22 L. T. 154; 18 W. R. 400; W. N. 33.

(*q*) *Sinclair* v. *Brougham*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. J. 302.

(*r*) See *Re David Payne & Co.*, [1904] 2 Ch. 608; 73 L. J. Ch. 849; 91 L. T. 777; 20 T. L. R. 590 (which, however, was the case of a joint stock trading company and not of a building society), overruling *Re Durham County Building Society, Davis's Case* (1871), 12 Eq. 516; 41 L. J. Ch. 124; 25 L. T. 83.

with him as security for an *ultra vires* loan (*s*), but this decision cannot now be relied on (*t*).

Personal liability of the directors for money borrowed in excess of powers.

But though money borrowed in excess of the prescribed limits creates no debt against the society the directors themselves may be personally liable for the amount advanced (*u*).

Notice that borrowing power is limited.

Persons dealing with the society are affected with notice of the limitation established by its rules. "It has also been urged upon us," said Baggallay, L. J., "that the plaintiffs had no means of knowing or ascertaining whether the society had exhausted its powers of borrowing; or whether indeed there was any limit to such power. To this argument I can only reply, that persons who deal with corporations and societies that owe their constitution to, or have their powers defined or limited by, Acts of Parliament, or are regulated by deeds of settlement or rules, deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution and the extent of the powers of the corporation or society with which they deal. The plaintiffs and every one else who has dealings with a building society are bound to know that such a society has no power of borrowing, except such as is conferred upon it by its rules, and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power

(*s*) *Wilson's Case* (1871), 12 Eq. 521; 41 L. J. Ch. 125; 25 L. T. 84.

(*t*) See *Cunliffe Brooks & Co.* v. *Blackburn Benefit Building Society*, cited above, p. 132.

(*u*) See the cases cited in note (*n*), *ante*, p. 139.

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it may have has been exceeded, they must take the consequences of their carelessness" (*v*).

Over-drawing banking account is borrowing.

There is no distinction between borrowing by overdrawing the society's banking account, and borrowing by obtaining a loan in the ordinary way; see the cases cited *ante*, p. 103.

(*v*) *Per* Baggally, L. J., *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. p. 712; and see *Portsea Island Building Society* v. *Barclay*, [1894] 3 Ch. p. 95, *per* Romer, J.

CHAPTER VI.

THE OFFICERS OF THE SOCIETY.

A. *Incorporated Societies.*

Officers.

THE affairs of a building society are managed, generally speaking, by a board of directors or committee of management, a secretary or manager, and two or more auditors; and it is usual also to appoint a solicitor to transact the legal business of the society, and a surveyor to advise the board on the value of property offered as security for advances. Trustees are not necessary officers in the case of an incorporated society, though they may be appointed for the purpose of investing surplus funds (*a*) and of being admitted to copyholds of which the society is mortgagee (*b*). Where the rules authorized the appointment of "a treasurer," the appointment of two persons to be treasurer was held good (*c*). Whether a corporation can properly be appointed an officer of a building society seems doubtful: see *Ex parte Swansea Friendly Society*, cited *post*, p. 201. As to what persons are to be deemed "officers" within the meaning of sect. 215 of the Companies (Consolidation) Act, 1908, see *infra*, p. 369.

Officers are bound by the rules.

All the officers are bound by the rules (*d*), which

(*a*) Building Societies Act, 1874, s. 25; see *ante*, p. 78, as to this section.
(*b*) *Ibid.* s. 28; see *ante*, p. 86.
(*c*) *Sharp* v. *Warren* (1818), 6 Pr. 131.
(*d*) Building Societies Act, 1874, s. 21.

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must specify their powers and duties and the manner of appointing, remunerating, and removing them (*e*). The names of the officers should not be inserted in the rules.

Officers to give security.

Every officer having the receipt or charge of any money belonging to the society must, before taking upon himself the execution of his office, become bound with one sufficient surety at the least, in a bond according to the form below, or give the security of a guarantee society, or such other security as the society direct, in such sum as the society require, conditioned for rendering a just and true account of all moneys received and paid by him on account of the society, and for payment of all sums of money due from him to the society, at such times as its rules appoint, or as the society require him to do so (*f*).

Security.

It was probably intended by the legislature that, in the absence of any special direction by the society, the directors or committee of management should see that security is given in accordance with this provision, though the obligation is not imposed upon them in terms. If this duty does in fact rest on the directors they would no doubt be liable for any loss resulting to the society from its non-performance (*g*).

Form of bond.

The form of bond given in the Schedule to the Act of 1874 is as follows:—

KNOW ALL MEN by these presents, that we, A. B., of , one of the officers of the Building Society, established

(*e*) Building Societies Act, 1874, s. 16, sub-ss. 6, 12.
(*f*) *Ibid.* s. 23.
(*g*) See *Evans* v. *Coventry* (1857), 8 De G. M. & G. 835; 26 L. J. Ch. 400; 5 W. R. 436; 29 L. T. (O. S.) 118; 22 J. P. 19; varying the decision below, 2 Jur. N. S. 557; 25 L. J. Ch. 491; 4 W. R. 466; 27 L. T. (O. S.) 85; 20 J. P. 691.

at in the county of , and C. D. of (as surety on behalf of the said A. B.), are jointly and severally held and firmly bound to the said society in the sum of to be paid to the said society, for which payment well and truly to be made we jointly and severally bind ourselves, and each of us by himself, our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the day of in the year of our Lord . CHAP. VI.

WHEREAS the above-bounden A. B. hath been duly appointed to the office of of the Building Society, established as aforesaid, and he, together with the above-bounden C. D. as his surety, *have* entered into the above-written bond, subject to the condition hereinafter contained: *Sic.*

NOW THEREFORE the condition of the above-written bond is such, that if the said A. B. shall and do render a just and true account of all moneys received and paid by him, and shall and do pay over all the moneys remaining in his hands, and assign and transfer or deliver all securities and effects, books, papers, and property of or belonging to the said society in his hands or custody, to such person or persons as the said society shall appoint, according to the rules of the said society, together with the proper or legal receipts or vouchers for such payments, then the above-written bond shall be void and of no effect, otherwise shall be and remain in full force and virtue.

Fidelity guarantee policy.

In one case a fidelity guarantee policy for 100*l.* was effected by the secretary of a building society. The policy provided that any salary, commission, or other money which should be due to the employed should be deducted from the amount payable under the policy, and that all moneys and effects of the employed in the hands of the employer, or due from the employer to the employed, or which should come into the possession of the employer on account of the employed, after discovery of any act on the part of the employed where-

CHAP. VI. upon any claim should be made on the policy, should be applied by the employer in making good the amount of his claim under the policy in priority to any person claiming upon such money or effects. The secretary, who was also a shareholder, embezzled money of the society to the amount of 150*l*. In an action on the policy by the society and the trustees in its liquidation, it was held that sums standing to the credit of the secretary must be deducted from the amount he had embezzled, and not from the 100*l*.; that as the society was in liquidation the real value of the secretary's shares could not then be ascertained; that the plaintiffs were consequently entitled to be paid the full sum of 100*l*., but that if anything was ultimately found due to the secretary, the plaintiffs must hold it for the defendants in reduction of that sum (*h*).

Extent of surety's liability.

In a case that occurred in New Zealand, sureties for the due performance by the secretary of the duties of his office, and for his duly accounting for all moneys of the society, were held not to be liable for his misappropriation of funds of the society which according to the rules ought never to have been paid to him; and it was further held that it made no difference that it had for some years been the practice of the secretary, acting under a resolution of the managing committee, to receive moneys of the society, even though the sureties had notice (*i*).

Laches of obligee.

The mere laches of the obligee, or his mere passive

(*h*) *Fifth Liverpool Starr-Bowkett Building Society* v. *Travellers' Accident Insurance Company, Limited* (1893), 9 T. L. R. 221.

(*i*) *Sperry* v. *Dransfield* (1884), 2 N. Z. L. R. 319.

acquiescence in acts which are contrary to the conditions of the bond, is not sufficient of itself to relieve a surety (*j*); to discharge a surety there must be active connivance, on the part of the obligee, amounting almost, if not entirely, to a fraud (*k*).

Officers to account.

Every officer, his executors or administrators, must, upon demand made, or notice in writing given or left at his last or usual place of business, give in his account as may be required by the board of directors or committee of management of the society, to be examined and allowed or disallowed by them, and must, on the like demand or notice, pay over all the moneys remaining in his hands, and deliver all securities and effects, books, papers, and property of the society in his hands or custody, to such person as the society appoint (*l*).

Neglect or refusal to account.

In case of any neglect or refusal to deliver such account, or to pay over such moneys, or to deliver such securities and effects, books, papers, and property, the society may sue upon the bond, or may apply to the County Court, who may proceed thereupon in a summary way, and make such order thereon as to the Court in its discretion shall seem just, which order will be final and conclusive (*m*).

Remedy of the society against its officers.

The remedy of the society against an officer under this provision is therefore twofold. It may either (1) sue him on the bond; or (2) apply (in England) to the

(*j*) See *Mayor, &c. of Durham* v. *Fowler* (1889), 22 Q. B. D. 394; 58 L. J. Q. B. 246; 60 L. T. 456; 5 T. L. R. 238, and cases there referred to.

(*k*) *Dawson* v. *Lawes* (1854), Kay, p. 301; 23 L. J. Ch. p. 438, *per* Wood, V.-C.

(*l*) Building Societies Act, 1874, s. 24.

(*m*) *Ibid.*

CHAP. VI. County Court of the district in which the chief office or place of meeting for the business of the society is situated, and the Court may proceed in a summary way and make such order as it thinks just, from which order there will be no appeal.

Suing on the bond.

1. An action on the bond may be brought in any Court, apparently; but if brought in the High Court, and not more than 100*l.* is recovered, only County Court costs will probably be allowed (*n*).

Proceeding in County Court.

2. If the society proceed in the County Court, the application, whether any bond be put in suit or not, must be by action commenced by plaint and summons in the ordinary way, in which the society will be plaintiff, and the officer against whom the application is made will be defendant (*o*). Particulars of demand must be filed; and if the application be made by action without putting the bond in suit, the particulars must state shortly the nature of the thing required to be done or the neglect complained of (*p*). If the thing required to be done be the delivering up of any property, the particulars must contain a description of the property required to be given up (*q*).

Claim is not a "dispute."

A claim by a society against one of its officers for misappropriating and keeping in his hands money belonging to the society is not a "dispute" that must be referred to arbitration, and an action for it will not be stayed (*r*).

(*n*) See *Duxbury* v. *Barlow*, [1901] 2 K. B. 23; 70 L. J. K. B. 478; 49 W. R. 450; 84 L. T. 518; 17 T. L. R. 420; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3.
(*o*) County Court Rules, 1903, 1914, Ord. XLI. r. 7.
(*p*) *Ibid.* rr. 8, 9.
(*q*) *Ibid.* r. 10.
(*r*) *Municipal Permanent Investment Building Society* v.

Dismissed officer.

An officer who has been dismissed may be ordered forthwith to deliver up property belonging to the society without regard to the question whether the dismissal was wrongful or not, and from such an order there is no appeal (*s*).

Mandamus.

An officer who has been dismissed has no remedy by mandamus, which lies only to reinstate a person in an office when the office and its tenure are of a permanent character (*t*).

Removal of officer.

No meeting of directors can remove an officer and appoint a successor in his place unless the meeting has been duly constituted. Thus, where the power of electing the treasurer and other officers was vested in a committee of eleven persons, and at a meeting at which ten members only were present—the eleventh not having received notice—the existing treasurer was removed and another person elected in his stead, it was held that the election was void (*u*).

Scotland and Ireland.

In Scotland an application under sect. 24 must be made to the Sheriff's Court of the county in which the chief office or place of meeting for the business of the society is situate; in Ireland it is made to the Civil Bill Court within the jurisdiction of which the chief office or place of meeting is situate (*v*).

Richards (1888), 39 Ch. D. 372; 58 L. J. Ch. 8; 37 W. R. 184; 58 L. T. 931; 59 L. T. 883; *Sinden* v. *Banks* (1861), 3 El. & El. 623; 30 L. J. Q. B. 102; 7 Jur. N. S. 910; 9 W. R. 415; 3 L. T. 775; *S.C. nom. Lindon* v. *Banks*, 25 J. P. 390.

(*s*) *First Edinburgh, &c. Starr-Bowkett Building Society* v. *Munro* (1883), 11 Rettie, 5.

(*t*) *Evans* v. *Hearts of Oak Benefit Society* (1866), 12 Jur. N. S. 163.

(*u*) *Roberts* v. *Price* (1847), 4 C. B. 231; 11 Jur. 352; 16 L. J. C. P. 169.

(*v*) Building Societies Act, 1874, s. 4.

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Punishment of fraud in withholding or misapplying money or effects of society.

If any person whosoever, by false representation or imposition, obtains possession of any moneys, securities, books, papers, or other effects of the society, or having the same in his possession, withholds or misapplies the same, or wilfully applies any part thereof to purposes other than those expressed or directed in the rules of the society and authorized by the Act of 1874, he will be liable on summary conviction to a penalty not exceeding twenty pounds, with costs not exceeding twenty shillings, and to be ordered to deliver up to the society all such moneys, securities, books, papers, or other effects of the society, and to repay the amount of money applied improperly, and in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, to be imprisoned, with or without hard labour, for any time not exceeding three months; but nothing contained in this provision will prevent any such person from being proceeded against by way of indictment if a conviction has not been previously obtained against him for the same offence under the provisions of the Act (*w*).

Who may take proceedings.

Proceedings under the above section may be taken by or at the instance of—

(a) the society; or

(b) any member authorized by the society, or by the board of directors or committee of management thereof, or by the registrar; or

(c) the registrar (*x*).

"Withholds or misapplies."

In a case under the Friendly Societies Act, 1855 (*y*),

(*w*) Building Societies Act, 1874, s. 31.
(*x*) Building Societies Act, 1894, s. 18.
(*y*) 18 & 19 Vict. c. 63, s. 24.

which contained provisions very similar to the above, it was held that to render the treasurer of a society liable to penalties for 'withholding or misapplying' moneys of the society which had come to his hands as treasurer, it must be shown that he had been guilty of some fraud or misrepresentation, and that mere inability to pay over the money to the trustees was not enough (*z*).

"Wilfully applies" to unauthorized purposes.

So, where the charge is of 'misapplying and wilfully applying to purposes other than those expressed or directed in the rules,' there must be proof of dishonesty; see *Scott* v. *Wilson* (*a*), where the members of a moribund branch of a friendly society distributed the funds amongst themselves, and it was held that the justices were right in refusing to convict.

The law is the same in Victoria; to warrant a conviction it must be shown that the misapplication was made with a criminal intent (*b*).

Officer cannot be sued for money after judgment and execution for misappropriation.

If an officer who has been convicted of misappropriating money has been ordered to repay it, and to pay a penalty and costs, and has been imprisoned for default in obeying the order, he cannot afterwards be sued for the money (*c*). "In the statute in question," said Lord

(*z*) *Barrett* v. *Markham* (1872), L. R. 7 C. P. 405; 41 L. J. M. C. 118; 27 L. T. 313; 36 J. P. 535. And see also *Ex parte O'Donnell* (1865), L. R. 1 Q. B. 274; 35 L. J. M. C. 99; 14 W. R. 83; 30 J. P. 279; *R.* v. *Bennett and Ward* (1894), 63 L. J. M. C. 181; 38 Sol. J. 532, decided under sect. 16, subsect. 9, of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60); *Madden* v. *Rhodes*, [1906] 1 K. B. 534; 75 L. J. K. B. 329; 54 W. R. 373; 94 L. T. 741; 21 Cox, C. C. 180; 70 J. P. 230; 22 T. L. R. 356, decided under the Trade Union Act, 1871 (34 & 35 Vict. c. 31).

(*a*) (1893), 9 T. L. R. 492.

(*b*) See *Duncan* v. *Greenwood* (1900), 25 V. L. R. 634; *Duncan* v. *Kepert* (1900), 26 V. L. R. 182.

(*c*) *Vernon* v. *Watson*, [1891] 2 Q. B. 288; 60 L. J. Q. B. 472; 39 W. R. 519; 64 L. T. 728; 56 J. P. 85; affg. *S. C.* below,

CHAP. VI. Halsbury, L. C., "two different proceedings have been mixed together by the act of the Legislature. First, there is a penalty imposed for wilfully withholding or misapplying the property of the society, and then there follows that which is strictly and properly a civil proceeding, namely, an order to deliver up the property or repay the money improperly withheld or misapplied, and if default be made in such delivery or repayment, or if default be made in payment of the penalty and costs, in either of those cases the statute prescribes a maximum amount of imprisonment, which is to be a satisfaction for the criminal offence, and also for the non-payment of the civil debt and costs. We must apply the ordinary principles of law to each part of the procedure. In fact, the legislation itself points in that direction, because one part of the section provides that the criminal proceedings taken under it shall not interfere with the right to indict, but there is no corresponding provision with respect to the civil part of the process. The result in the present case is that the respondent has been summoned for a civil debt; that he has been ordered to pay it, and that he has had execution against him in respect of it. It seems to me impossible to contend, on the true construction of the statute, that there has not been execution executed and a satisfaction of the debt. Under those circumstances it is impossible to say that there is any power to sue again for the same debt" (*d*).

[1891] 1 Q. B. 400; 60 L. J. Q. B. 205; 64 L. T. 460; 55 J. P. 454; *Knight* v. *Whitmore* (1885), 53 L. T. 233; both decided under the Friendly Societies Act, 1875, s. 16, sub-s. 9.

(*d*) [1891] 2 Q. B. p. 290.

Liability for neglect of statutory duty and for false entries.

As to the liability of the officers for the society's neglect of its statutory duties, and as to liability for false statements in any documents sent to the registrar, see *ante*, pp. 92, 93.

Examination of officers by inspector.

The officers are liable to be examined on oath touching the society's affairs by any inspector appointed by the registrar under sect. 5 of the Act of 1894 (*e*).

Gifts not to be accepted by officials for loans made by the society.

No director, secretary, surveyor, solicitor, or other officer of an incorporated society may, in addition to the remuneration prescribed or authorized by the rules of the society, receive from any other person any gift, bonus, commission, or benefit, for or in connection with any loan made by the society; and any person paying or accepting any such gift, bonus, commission, or benefit, will be liable on summary conviction to a fine not exceeding fifty pounds, and, in default of payment, to be imprisoned with or without hard labour for any time not exceeding six months, and the person accepting any such gift, bonus, commission, or benefit must, as and when directed by the Court by whom he is convicted, pay over to the society the amount or value of such gift, bonus, commission, or benefit, and in default of such payment will be liable to be imprisoned with or without hard labour for any time not exceeding six months (*f*).

Competency of defendant and wife as witnesses.

Upon the hearing of any charge involving the infliction of fine or imprisonment on summary conviction under the Building Societies Act, 1894, the defendant and his wife are admissible as competent witnesses (*g*).

(*e*) Building Societies Act, 1894, s. 5 (3), *post*, p. 231.
(*f*) *Ibid.* s. 23.
(*g*) *Ibid.* s. 24.

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Commission for introducing business.

In a case that occurred in Victoria it was held by the Supreme Court that, in the absence of any allegation of fraud, it was not *primâ facie* unlawful for the directors to pay to the secretary of a building society, or for the secretary to receive, moneys by way of commission upon the introduction by him of business to the society outside the scope of the secretary's employment (*h*).

Purchase by officer of mortgaged property.

An officer of the society employed about a sale of property mortgaged to the society and sold under the power of sale is entirely disabled from becoming the purchaser, and any such purchase will be set aside by the Court, even though the sale was by auction and there is no proof of undervalue (*i*).

Agreement to stifle a prosecution.

In endeavouring to recover money of the society which has been misappropriated by one of its officers, the directors must be careful not to come within the rule of law forbidding any agreement to stifle a prosecution. "If the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it" (*ii*). In one case (*j*), the secretary of a building society, who

(*h*) *Britter* v. *Sprigg* (1900), 26 V. L. R. 65.

(*i*) *Martinson* v. *Clowes* (1882), 21 Ch. D. 857; 51 L. J. Ch. 594; 30 W. R. 795; 46 L. T. 882; affd. 52 L. T. 706; (1885), W. N. 41; *Hodson* v. *Deans*, [1903] 2 Ch. 647; 72 L. J. Ch. 751; 89 L. T. 92; 19 T. L. R. 596.

(*ii*) *Keir* v. *Leeman* (1844), 6 Q. B. p. 321; 13 L. J. Q. B. 359; 8 Jur. 824, *per* Lord Denman, C.J.; 9 Q. B. 371; 15 L. J. Q. B. 359; 10 Jur. 742; and see *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351; 59 L. J. Ch. 608; 38 W. R. 738; 63 L. T. 366.

(*j*) *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173; affirming the decision below, [1891] 2 Ch. 587; 61 L. J. Ch. 138; 40 W. R. 273; 65 L. T. 314, 685; 17 Cox, C. C. 334, 389; 8 T. L. R. 133; and see also *Cannon* v. *Rands* (1870),

had made default in accounting for money paid to him and was threatened by the society with a prosecution for embezzlement, applied for assistance to the plaintiffs, who were his relatives, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and that was known to the directors of the society; but no promise was made that there should be no prosecution. The society brought an action on the promissory notes in the Queen's Bench Division, and the plaintiffs brought an action in the Chancery Division to set aside the promissory notes and the collateral securities on the ground that they were made for an illegal consideration. The Queen's Bench action was transferred to the Chancery Division, and the two actions tried together, and it was held that it was an implied term of the agreement that there should be no prosecution; that the agreement was therefore founded on an illegal consideration, and void; and that the society could not recover on the promissory notes or enforce the securities; and, the society not opposing, they were ordered to be delivered up to the plaintiffs. So, where the mother of a defaulting secretary paid money to the

23 L. T. 817; *Andrews* v. *Southwart* (1885), Dip. & Gam. Friendly Society Cases, p. 73.

CHAP. VI. society under pressure and upon an agreement that there should be no prosecution, she recovered back the amount (*k*).

Security, when valid.

But there is no objection to a third person giving security for the amount misappropriated, provided there is no pressure and no agreement, express or implied, to stifle a prosecution. Thus, where a wife voluntarily executed a mortgage to secure a deficiency in her husband's accounts, the security was upheld (*l*). "I think it is quite possible," said Fry, L. J., "that the directors may know that the man is liable to prosecution; the wife may know the same, and if she of her own will makes a sacrifice for the purpose of protecting her husband, that is not pressure, and that is not a bargain" (*m*). But where a prosecution was withdrawn, though with the consent of the magistrate, on terms of the wife depositing her title deeds as security for the loss, the arrangement was held to be clearly illegal and the security void (*n*).

Officer common to two societies.

Where the same person is an officer of two societies, knowledge which he has acquired as officer of one society will not be imputed to the other unless he has some duty imposed on him to communicate his knowledge to the society sought to be affected by the notice and some duty imposed on him by that society to

(*k*) *Howarth* v. *First Bury Starr-Bowkett Building Society*, Manchester Assizes, December 11th, 1895; January 11th, 1896, Kennedy, J.

(*l*) *McClatchie* v. *Haslam* (1891), 17 Cox, C. C. 402; 65 L. T. 691; 8 T. L. R. 134; W. N. 191, reversing the decision below, 63 L. T. 376; and see *Ward* v. *Lloyd* (1843), 6 Man. & G. 785; 7 Scott, N. R. 499; *Flower* v. *Sadler* (1882), 10 Q. B. D. 572.

(*m*) 17 Cox, C. C. p. 408.

(*n*) *Whitmore* v. *Farley* (1881), 45 L. T. 99; 29 W. R. 825; W. N. 80, C. A.

receive the notice, and if he has been guilty of some fraud or irregularity the Court will not draw the inference that he has fulfilled these duties (*o*).

Directors or committee of management.

To consider now the duties and liabilities of the different officers somewhat more in detail, we have, first, the board of directors or committee of management, to whom the general conduct of the society's business is entrusted, and to whom the secretary and other officers are usually subordinate. The powers and duties of the directors or committee must be set forth in the rules, but they have in addition the following statutory powers:—

Statutory powers.

(1) They may require officers having receipt or charge of money to give in their accounts to be examined, and allowed or disallowed by the board (*p*):

(2) Where the society does not do so, they may from time to time appoint and remove trustees for the purpose of investments in the public funds, or on security of copyhold or customary estate (*q*):

(3) They may direct payment of sums not exceeding 50*l*. belonging to members or depositors who die intestate, without letters of administration being taken out (*r*):

(*o*) See *Re Hampshire Land Co.*, [1896] 2 Ch. 743; 65 L. J. Ch. 860; 45 W. R. 136; 75 L. T. 181; 3 Manson, 269; 12 T. L. R. 517; *Re Marseilles Extension Ry. Co.* (1871), 7 Ch. 161; 41 L. J. Ch. 345; 20 W. R. 254; 25 L. T. 858; *Gale* v. *Lewis* (1846), 9 Q. B. 730; 16 L. J. Q. B. 119; *Re David Payne & Co.*, [1904] 2 Ch. 608; 73 L. J. Ch. 849; 91 L. T. 777; 11 Manson, 437; 20 T. L. R. 590.

(*p*) Building Societies Act, 1874, s. 24, *ante*, p. 147.

(*q*) *Ibid.* s. 25, *ante*, p. 78.

(*r*) *Ibid.* s. 29, *post*, p. 236.

(4) They may order the affixing of the seal to receipts for vacating mortgages and further charges (*s*):

(5) They may authorize any member to take proceedings under sect. 31 of the Act of 1874, to recover money or effects of the society (*t*).

Three members of the board or committee must sign, with the secretary or other officer, any application for a direction to the registrar to transfer stock belonging to the society (*u*).

Statutory liabilities.

On the other hand they are subject to the following statutory liabilities:—

(1) If the society receives loans or deposits in excess of the statutory limits, every member of the board or committee of management is personally liable for the amount so received in excess (*v*):

(2) If the society uses any name or title other than its registered name, or accepts any deposit except on the terms that not less than one month's notice may be required before repayment or withdrawal, every member of the board or committee who is a party to the proceeding will be liable to a fine not exceeding 10*l*., and in the case of a continuing offence, to an additional fine not exceeding 10*l*. for every week during which the offence continues (*w*):

(3) If any advance is made on second mortgage (except where the society itself is the first mort-

(*s*) Building Societies Act, 1874, s. 42; for form of receipt, see *post*, p. 306.
(*t*) Building Societies Act, 1894, s. 18, *ante*, p. 150.
(*u*) Building Societies Act, 1874, s. 26, *ante*, p. 84.
(*v*) *Ibid.* s. 43; see as to this, *ante*, p. 110.
(*w*) Building Societies Act, 1894, s. 15, *ante*, pp. 50, 107.

gagee) the directors who authorized the advance will be jointly and severally liable for any loss thereby occasioned to the society (*x*):

(4) If the society fails to perform any statutory duty, or to do any act or furnish any return required by the registrar or an inspector, then, in the absence of any officer bound by the rules to fulfil the duty of which a breach has been committed, every member of the board or committee, unless it appears that he was ignorant of or attempted to prevent the breach, will for each offence be liable to a fine not exceeding 20*l*., and in the case of a continuing offence, to an additional fine not exceeding 5*l*. for every week during which the offence continues (*y*):

(5) They are forbidden under heavy penalties to accept, in addition to their regular remuneration, any bonus or commission in connection with any loan made by the society (*z*).

Directors are not trustees, but agents.

With regard to the general conduct of the society's business, the position of the directors is substantially the same as that of the directors of an ordinary joint-stock trading company, that is to say, they are not trustees, but paid confidential agents, with very extensive powers, selected to manage the affairs of the society for the benefit of themselves and the other shareholders (*a*). The law with regard to the general powers

(*x*) Building Societies Act, 1894, s. 13. As to Scotland and Ireland, see *ante*, p. 61.

(*y*) *Ibid.* s. 21, *ante*, p. 93.

(*z*) *Ibid.* s. 23, *ante*, p. 153.

(*a*) As to the inability of a general meeting to interfere with directors to whom the management of the company's business has

CHAP. VI. and liabilities of the directors of a trading company was fully discussed and the authorities considered by Mr. Justice Kay in his judgment in *Re Faure Electric Accumulator Co.* (*b*). The learned judge said (40 Ch. D. p. 150): "These questions involve a consideration of what is the real position of the directors of a joint-stock trading company. With respect to the capital of the company which is under their management, it has been said that they are '*quasi*-trustees' for the company: *Flitcroft's Case* (*c*). In that and other respects they are, 'to a certain extent, trustees' (Lindley on Partnership)(*d*). In the language of Lord Romilly, in *York and North Midland Ry. Co.* v. *Hudson* (*e*), 'The directors are persons selected to manage the affairs of the company for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely.' They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will. One obvious distinction is that the property of the company is not legally vested in them. Another, and perhaps still broader, difference is that they are the managing agents of a trading association, and such control as they have over

been entrusted, see *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame*, [1906] 2 Ch. 34; 75 L. J. Ch. 437; 13 Manson, 156; 94 L. T. 651; 22 T. L. R. 378; *Gramophone and Typewriter, Ltd.* v. *Stanley*, [1908] 2 K. B. 89; 77 L. J. K. B. 834; 15 Manson, 251; 99 L. T. 39; 24 T. L. R. 480.

(*b*) (1888), 40 Ch. D. 141; 58 L. J. Ch. 48; 37 W. R. 42; 59 L. T. 918; 5 T. L. R. 63; and see *G. E. Ry. Co.* v. *Turner* (1872), 8 Ch. p. 152, *per* Lord Selborne, L. C.

(*c*) (1882), 21 Ch. D. 519, 534; 52 L. J. Ch. 217; 31 W. R. 174; 48 L. T. 86.

(*d*) 4th ed. p. 587.

(*e*) (1853), 16 Beav. 485, 491.

its property, and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house to whom the control of its property and very large powers for the management of its business are confided; but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control, except the action of the shareholders of the company. However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent. In *In re Forest of Dean Coal Mining Co.* (*f*), Sir G. Jessel, M. R., said: 'Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners. It does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it. . . . They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and,

(*f*) (1878), 10 Ch. D. 451, 453; 27 W. R. 594; 40 L. T. 287.

CHAP. VI. as I said before, they are only the managing partners.' In *Smith* v. *Anderson* (*g*), Lord Justice James said: 'The distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors.' If directors apply money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust. On the other hand, if they apply the money of the company or exercise any of its powers in a manner which is not *ultra vires*, then a strong and clear case of misfeasance must be made out to render them liable. Lord Hatherley, in *Overend & Gurney Co.* v. *Gibb* (*h*), intimates that in such a case their conduct must amount to *crassa negligentia*.

(*g*) (1880), 15 Ch. D. p. 275; 50 L. J. Ch. 39; 29 W. R. 21; 45 L. T. 329.
(*h*) (1872), L. R. 5 H. L. 487; 42 L. J. Ch. 67.

In *Marzetti's Case* (*i*) a definite test is applied. Lord Justice James said: 'A director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees.' And he intimates that the negligence for which a director would be held liable must be such as would make a managing director of a business liable to his employers. Lord Justice Brett said the director must be 'guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law'; and with this Lord Justice Cotton concurs." In *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (*j*), the law was laid down by Lindley, L. J., as follows: "As directors, I am not aware that there is any difference between their legal and their equitable duties. If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case they clearly acted within their powers: they did nothing *ultra vires:* fraud is not imputed. The inquiry, therefore, is reduced to want of care and

(*i*) (1880), 28 W. R. pp. 542, 543.
(*j*) [1899] 2 Ch. 392, 435; 68 L. J. Ch. 699; 48 W. R. 74; 81 L. T. 334; 7 Manson, 165; 15 T. L. R. 436.

CHAP. VI. *bona fides* with a view to the interests of the nitrate company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them: see *Overend, Gurney & Co.* v. *Gibb* (*k*). Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. I do not know how better to describe it." See also *Re National Bank of Wales* (*l*), where this statement of the law was approved.

Sheffield, &c. Society v. *Aizlewood.*

In the case of *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (*m*), it was held that these principles applied also to the directors of a building society, and that such directors, having a large discretion vested in them as confidential agents, might properly make advances on securities of a speculative nature, and such as would not be admissible in the case of ordinary trustees. The facts in that case were as follows:—The rules provided that none of the directors should be answerable for any act or default of any other of them or for the insufficiency or deficiency in title of any security taken for the repayment of any advances, unless the loss should happen through their own neglect or default; that the board should

(*k*) (1872), L. R. 5 H. L. 480.

(*l*) [1899] 2 Ch. 629, 671; 68 L. J. Ch. 634; 48 W. R. 99; 81 L. T. 363; 15 T. L. R. 517; affd. in D. P. *nom. Dovey* v. *Cory*, [1901] A. C. 477; 70 L. J. Ch. 753; 50 W. R. 65; 85 L. T. 257; 8 Manson, 346; 17 T. L. R. 732.

(*m*) (1889), 44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678; 6 T. L. R. 25.

have power to conduct the affairs of the society according to its rules, to appoint agents and committees of directors, and to invest the funds of the company not immediately required for its purposes, according to sect. 25 of the Act of 1874 (which authorizes investments in leasehold securities); that the solicitor of the society should investigate the title to all property offered as security and prepare all mortgages; that the funds of the society should be applied at the discretion of the board in making advances to members in respect of the shares held by them on (*inter alia*) legal or equitable (*n*) mortgage of leasehold property, and that when the directors were of opinion that the premises were a sufficient security, and the solicitor was satisfied that the title to the property was satisfactory, the amount granted should be paid to the borrower on his executing a mortgage in the form required by the solicitor. In the year 1878, the directors advanced 25,000*l.* to a borrower upon two securities, the principal of which was a second mortgage of a leasehold colliery, taking at the same time, as collateral security, a charge upon certain beneficial interests under a trust of personal estate. During the negotiations which resulted in the advance, the chairman of the board was in direct communication with the borrower, and took an active part in inquiring into the nature and value of the security; while the other directors simply exercised in good faith their judgment on the materials submitted to them, and the advance was made upon a valuation and report by a competent surveyor selected by the

(*n*) See now Building Societies Act, 1894, s. 13, *ante*, p. 61.

CHAP. VI. chairman from five surveyors whose names were submitted by the borrower. In 1881, the first mortgagees of the principal colliery comprised in the society's security threatened to foreclose, and to prevent this the directors made a further advance of 41,000*l*., 40,000*l*. of which they borrowed for the purpose under their borrowing powers, and they subsequently entered into possession of the colliery, and paid an arrear of wages then due to the colliers, and they further expended considerable sums in payment of rents and royalties, and in working and maintaining the colliery until the society went into liquidation. On an action being brought against the surviving directors, and the representatives of two who had died, to make them liable for the moneys so advanced and expended, Mr. Justice Stirling held—

(1) That an advance upon the security of a leasehold colliery was within the powers of the society;

(2) That the inclusion of the interests in personal estate as collateral security did not necessarily vitiate the whole loan, though the propriety of the transaction must be tested as if no such ingredient entered into it;

(3) That it was within the powers of the directors to accept a leasehold colliery as security for an advance;

(4) That as the rules of the society did not limit the directors to securities under which a legal estate would be vested in them, and the risk of foreclosure by the first mortgagee was one which a man of business and ordinary prudence might be willing to incur, the directors

were not guilty of negligence in acting on the report of the surveyor and taking a second mortgage as their principal security;

(5) That the chairman, against whom the action came on in default of pleading to allegations that the advance was made upon improper security, was, but that the other directors were not, liable to make good to the society the loss of the sum advanced;

(6) That, as the first advance was within their powers, the directors had power by implication to do those things which might result from the working out of the relation subsisting between first and second mortgagees, and accordingly had power to redeem the first mortgagee and to exercise their borrowing powers for the purpose of paying him off;

(7) That they also had power to enter into possession of the mortgaged property, and to pay out of the assets of the society the rents reserved by the lease, and the proper expenses of maintaining and working the colliery without rendering themselves liable for such expenditure; but

(8) That an inquiry must be directed as to the sum paid by the directors for arrears of wages when they took possession, as such payment was not one for which there was a potential necessity.

Small v. *Smith*.

With this case may be compared *Small* v. *Smith* (*o*),

(*o*) (1884), 10 App. Cas. 119; *S. C. nom. Shiell's Trustees* v. *Scottish Property Investment Society in Liquidation*, 12 Rettie (H. L.), 14; 22 Sc. L. R. 139.

CHAP. VI. and *Portsea Island Building Society* v. *Barclay* (*p*). In *Small* v. *Smith* it was held by the House of Lords that directors who had made an advance to a member subject to a prior charge were not justified in giving a bond whereby the society in consideration of the prior mortgagees forbearing for six months to exercise their power of sale became bound at the expiration of that period to pay what was owing on the prior incumbrance, there not being, in the words of Lord Selborne, "a potential necessity for entering into a transaction of the kind to protect the security."

Portsea Island Building Society v. *Barclay.*

In *Portsea Island Building Society* v. *Barclay*, the facts were as follows:—The society had advanced 17,000*l.* to one of its members on a first mortgage, the rules forbidding any advance on an equity of redemption, though authorizing the directors to release part of any mortgaged property, if satisfied that the remainder would be a sufficient security. The society having exhausted its borrowing powers applied to an insurance company for a loan, and a deed was executed by which in consideration of 6,000*l.* paid by the insurance company to the member, he conveyed the mortgaged property to the company as security for the advance, the society concurring in the deed to postpone their own mortgage. The member at once handed over the 6,000*l.* to the society and was credited with that amount in part discharge of the 17,000*l.*, and the society at the same time deposited with the insurance company the deeds which they held from the member together with

(*p*) [1894] 3 Ch. 86; 63 L. J. Ch. 837; 8 R. 389; 43 W. R. 586; 71 L. T. 82; 1 Manson, 339; 10 T. L. R. 526, affd. on appeal, [1895] 2 Ch. 298; 64 L. J. Ch. 579; 12 R. 324; 72 L. T. 744; 11 T. L. R. 424.

a memorandum declaring that they had been so deposited by way of collateral security for the 6,000*l.* advanced to the member. On an action being brought to set aside the deed and the memorandum of deposit it was held (1) that the transaction was *ultra vires* and void, the society having no power either express or implied to enter into such a transaction; (2) that the insurance company's security for 6,000*l.* must be postponed to the society's security for 11,000*l.*; and (3) that the company was not entitled to a security as against the society in respect of any part of the 6,000*l.* applied in payment of any debts and liabilities properly payable by the society.

Directors, when held liable.

Where directors paid dividends to shareholders and remuneration to themselves out of imaginary profits, relying on delusive balance sheets which they had never properly examined, they were made liable for the sums so paid (*q*). So, where without the knowledge of the shareholders they voted and paid themselves out of the funds of the company a commission on certain purchases and sales, and entered such payment in the books of the company, but made no mention of it in their reports or balance sheets, they were ordered to repay the amount with interest (*r*). So, where directors had received a large sum from a borrower by way of bonus on the occasion of every loan made to him, they were made liable to the society for the amount so received (*s*).

(*q*) *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887), 36 Ch. D. 787; 57 L. J. Ch. 46; 36 W. R. 322; 57 L. T. 684; cited *post*, p. 185.

(*r*) *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; 56 L. J. Ch. 98; 35 W. R. 116; 55 L. T. 598.

(*s*) *Municipal Permanent Investment Building Society* v.

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And directors who take upon themselves to dispense with rules of the society imposing fines on members in arrear with the repayment of their advances will be liable for the amount thus lost to the society (*t*). They have no such dispensing power (*u*). Directors who make an advance on the security of the borrower's shares in the society will be liable for the consequences, such a security being altogether contrary to law and invalid (*v*); but not directors who make an advance on house property which one of the board has inspected and reported to be a sufficient security, though in the event it proves not to be so, for this is a mere error of judgment (*w*). A rule indemnifying the directors cannot of course extend to acts which are *ultra vires* of the society (*x*).

General principle.

It may therefore be considered settled that the directors of a building society have a larger discretion than is accorded to trustees, and that they will not be

Richards (1889), W. N. 103. See now Building Societies Act, 1894, s. 23, *ante*, p. 153.

(*t*) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, 110; 70 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44; 49 W. R. Dig. 18; *Cotterell* v. *Stratton* (1872), 8 Ch. p. 307, *per* James, L. J.

(*u*) *Handley* v. *Farmer* (1861), 29 Beav. 362; *Wilson* v. *Upper Canada Building Society* (1866), 12 Grant's Ch. Rep. 206.

(*v*) *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 39 W. R. 88; 63 L. T. 511; 6 T. L. R. 214, 449; 55 J. P. 148; and see *Young* v. *Naval, &c. Society of South Africa*, [1905] 1 K. B. p. 696; 74 L. J. K. B. 302; 53 W. R. 447; 92 L. T. 458; 21 T. L. R. 293.

(*w*) *Cullerne* v. *London and Suburban General Permanent Building Society;* and see *Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; 61 L. J. Ch. 617; 41 W. R. 75; 67 L. T. 90, where directors (in effect) lent money on security without seeing that they got it, but under the circumstances were held not liable.

(*x*) See *Cullerne* v. *London and Suburban General Permanent Building Society*, 59 L. J. Q. B. p. 529.

liable for anything short of gross negligence so long as they act honestly and do not exceed the powers, express or implied, with which they are entrusted. If, however, they act fraudulently, or if they apply the funds in a way that the society has not authorized, and *à fortiori* if they apply them in a way that it could not authorize, then they will be liable as for a breach of trust, and must make good any loss that the society may have sustained. "As soon as the conclusion is arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted" (*y*).

Directors may plead Statute of Limitations.

Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees in respect of money which has come to their hands, or is actually under their control. Consequently they can, in the absence of fraud, now take advantage of the Statute of Limitations in proceedings against them for misapplying the funds of the society (*z*).

Paid directors.

If directors are paid for their services they must discharge all the duties incident to their office for the payment agreed on, and cannot make extra charges for work properly within the scope of their employment as directors, *e.g.*, they cannot charge for travelling expenses to and from the board-room (*a*). Directors'

(*y*) *Per* Lindley, L. J., *Re Sharpe*, [1892] 1 Ch. p. 165; 61 L. J. Ch. 193; 40 W. R. 241; 65 L. T. 806.

(*z*) Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 1, 8; *Re Lands Allotment Co.*, [1894] 1 Ch. 616; 63 L. J. Ch. 291; 42 W. R. 404; 70 L. T. 286; 7 R. 115; 1 Manson, 107.

(*a*) *Young* v. *Naval, &c. Society of South Africa*, [1905] 1

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Knowledge of director, when imputed to society.

The personal knowledge of a director will not necessarily be imputed to the society; see *Re David Payne & Co.* (*c*), where a director of a lending company was aware that the borrowing company (which had a general power to borrow) were going to misapply the money borrowed, but as he owed no duty to the lenders either to receive or disclose information as to how the borrowed money was to be applied his knowledge was not imputed to them, and the loan was held good.

Withdrawal by director.

As to a director availing himself of his special knowledge of the society's financial position to give notice of withdrawal, see *post*, p. 251.

Embezzlement by director.

A director who is also employed as a servant of the society to collect moneys on its behalf may be convicted of embezzlement as a "clerk or servant" of the society under the Larceny Act, 1916 (*d*).

Liability on bills and notes.

Where a bill is accepted or a note drawn by directors or other officials, they must be careful, if they do not mean to be personally liable, to state explicitly on the face of the document that they are signing on behalf of the society—the mere addition after their names of the word "directors" or "secretary" will not suffice; "an agent putting his name to a mercantile instrument is liable as a principal, unless the instrument distinctly

K. B. 687; 74 L. J. K. B. 302; 53 W. R. 447; 92 L. T. 458; 21 T. L. R. 293, Farwell, J.

(*b*) *Boschoek Proprietary Co.* v. *Fuke*, [1906] 1 Ch. 645; 75 L. J. Ch. 261; 54 W. R. 359; 94 L. T. 398; 22 T. L. R. 196.

(*c*) [1904] 2 Ch. 608; 73 L. J. Ch. 849; 20 T. L. R. 590.

(*d*) *R.* v. *Stuart*, [1894] 1 Q. B. 310; 63 L. J. M. C. 63; 42 W. R. 303; 70 L. T. 44; 10 R. 124; 17 Cox, C. C. 723; 58 J. P. 299.

shows that he signs as agent" (*e*). Thus, in *Bottomley* v. *Fisher* (*f*), a promissory note was made in the following form:—

"Midland Counties Building Society, No. 3.

"Birmingham, 1st Sept., 1856.

"One month after demand, we jointly and severally promise to pay to Mr. John Bottomley the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per cent. per annum (payable half-yearly), for value received.

"W. R. HEATH,
"S. B. SMITH, } *Directors.*
"W. D. FISHER, *Secretary.*"

On an action being brought on this note against Fisher alone it was held that he was personally liable. Nor does affixing the seal to the bill or note exclude the personal liability of the signatories (*g*). The fact that the signatories, and they alone, are liable on the note will not, however, exclude the liability of the society if, in fact, the money was lent to the society (*h*).

In a recent case the note was in the following form: —"Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.* for value received

(*e*) *Lindus* v. *Melrose* (1858), 3 H. & N. p. 182; 22 Jur. 488; 6 W. R. 441; 31 L. T. (O. S.) 36, *per* Coleridge, J., delivering the judgment of the Exchequer Chamber.

(*f*) (1862), 1 H. & C. 211; 31 L. J. Ex. 417; 10 W. R. 669; 6 L. T. 688; 27 J. P. 23; and see also *Price* v. *Taylor* (1860), 5 H. & N. 540; 29 L. J. Ex. 331; 6 Jur. N. S. 402; 8 W. R. 419; 2 L. T. 221; 24 J. P. 470; *Allan* v. *Miller* (1870), 22 L. T. 825; *Healey* v. *Story* (1848), 3 Ex. 3; 18 L. J. Ex. 8.

(*g*) *Dutton* v. *Marsh* (1871), L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; 19 W. R. 754; 24 L. T. 470.

(*h*) *Heath* v. *Kidsgrove Permanent Building Society* (1887), 82 L. T. Journ. p. 449; and see *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; 29 W. R. 529; 44 L. T. 449.

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together with six per cent. interest per annum. J. H. Smethurst's Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director." It was held by the Court of Appeal, reversing the decision of Channell, J., that the note was that of the company, and that the defendant was not personally liable (*i*).

In a case that occurred in New South Wales the secretary of the society discounted with the plaintiff bank a forged bill, purporting to be signed by the defendant and others who were directors, and the proceeds were placed to the credit of the society's account. The defendant and others as directors drew cheques on this account which were paid by the bank out of the proceeds of the forged bill. On the forgery being discovered the bank brought an action against the defendant for money paid and money lent; it was held that, as the evidence showed that the bank had given credit to the defendant *quâ* director and not in his personal capacity, they could not recover (*j*).

Liability for work ordered by secretary.

The directors will be liable to pay for work done by order of the secretary, if there is evidence to satisfy the jury that the secretary was the general agent of the directors, even though the work was not ordered at a board meeting (*k*).

Common seal.

The rules usually direct that the common seal of the society shall be kept at the chief office under lock and key, and be affixed only by order of the board, and in presence of two or more directors and the secretary.

(*i*) *Chapman* v. *Smethurst*, [1909] 1 K. B. 73, 927; 78 L. J. K. B. 654; 100 L. T. 465; 25 T. L. R. 383; 14 Com. Cas. 94; 16 Mans. 171; 53 Sol. J. 340.

(*j*) *City Bank* v. *Allen* (1880), 1 N. S. W. L. R. 179.

(*k*) *Allard* v. *Bourne* (1863), 15 C. B. N. S. 468; 3 N. R. 42.

Whatever formalities are prescribed for the use and custody of the seal the directors should be careful to adhere to, though the simple omission of a formality, or a departure from the forms required, will not nullify a contract to which the seal has been affixed, provided it be of a kind authorized by the constitution and rules of the society (*l*); nor, it seems, will great negligence in the custody of the seal disentitle the society to recover property of which it has been deprived by a fraudulent use of the seal, unless such negligence has led directly and proximately to the loss (*m*). Where three directors formed a quorum, a meeting at which two only were present authorized the secretary to affix the company's seal to a mortgage, which was accordingly done by the secretary in the presence of the same two directors; the Court held that as between the company and the mortgagees who had no notice of the irregularity the execution of the deed was valid (*n*).

Use of seal in dissolution.

A rule that the seal 'should be used only by the express authority of the directors in the presence of two of them who should sign their names as witnesses, and

(*l*) *Prince of Wales Assurance Co.* v. *Harding* (1857), E. B. & E. 183; 3 C. B. N. S. 756, *per* Lord Campbell, C. J.; *Re County Life Assurance Co.* (1870), 5 Ch. 288; 39 L. J. Ch. 471; 18 W. R. 390; 22 L. T. 537; Lindley on the Law of Companies, 6th ed. p. 218.

(*m*) *Mayor, &c. of Merchants of the Staple of England* v. *Bank of England* (1887), 21 Q. B. D. 160; 57 L. J. Q. B. 418; 56 L. T. 665; 52 J. P. 580; *Bank of Ireland* v. *Trustees of Evans' Charities* (1855), 5 H. L. C. 389; 3 W. R. 573; 25 L. T. (O. S.) 272.

(*n*) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L. J. Ch. 451; 43 W. R. 486; 72 L. T. 375; 2 Manson, 223; 12 R. 183; following *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L. J. Q. B. 317; 2 Jur. N. S. 663; and *Mahony* v. *East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; 33 L. T. 383; and see *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115; 70 L. J. Ch. 82; 49 W. R. 100; 83 L. T. 547.

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the secretary, who should countersign,' was held by the registrar not to have been rescinded by a dissolution of the society under an instrument of dissolution (*o*).

A rule requiring the seal to be affixed pursuant to a resolution of the board passed "at the request of the trustees" was held to be abrogated by the Act of 1874, which did away with the necessity for trustees and made the society a corporate body (*p*).

Omission to sign minutes.

Where one of the rules, after conferring various powers on the managers, declared that "the minutes of the managers entered in the minute-book and signed by the managers concurring therein shall be sufficient authority for the execution of any of the aforesaid powers," it was held that the execution by the managers of the powers entrusted to them was in no way invalidated by their omission to sign in conformity with the rule (*q*).

Confirming minutes.

A director who merely votes for the confirmation of the minutes of a previous meeting at which he was not present does not thereby become responsible for what was done at such previous meeting (*r*).

Notice of business.

The directors, being the select managing body of the society, can at any meeting of the board deal with all affairs of the society then requiring attention, whether

(*o*) *Forbes* v. *Safety Permanent Building Society,* August 10th, 1892.

(*p*) *Fourth City Mutual Benefit Building Society* v. *Williams* (1879), 14 Ch. D. p. 143, Jessel, M. R.

(*q*) *Priestly* v. *Hopwood* (1864), 12 W. R. 1031; 10 L. T. 646; 4 N. R. 239; 28 J. P. 628.

(*r*) *Re Lands Allotment Co.*, [1894] 1 Ch. 616; 63 L. J. Ch. 291; 1 Mans. 107; 42 W. R. 404; 7 R. 115; 70 L. T. 286; 10 T. L. R. 163, 234; *Burton* v. *Bevan,* [1908] 2 Ch. 240; 99 L. T. 342; 15 Mans. 272.

ordinary or not, and previous notice of the particular business to be brought forward is not necessary to the validity of their proceedings (*s*).

Resignation of director.

It would seem that in the absence of some provision to that effect in the rules, a director is not authorized to send in his resignation to his colleagues, he can only resign to a general meeting of the society: see *Municipal Freehold Land Co.* v. *Pollington* (*t*). In that case a director of a joint-stock company, governed by Table A. in the schedule to the Companies Act, 1862, which contained no provision as to the resignation of directors, sent a letter to the board resigning his office. The resignation was ordered to stand over, and was accepted by the company at its next general meeting. Mr. Justice Kekewich held that the board had no power to accept the resignation, which, therefore, did not become effective till it was accepted by the general meeting. In *Re National Bank of Wales* (*u*), on the other hand, the articles provided that a director might resign, and that on the acceptance of his resignation by a board his office should be vacant, and under this provision a director resigned and the board accepted his resignation. After this his name appeared as one of the directors in a report presented by the board to the shareholders, but he took no part in the preparation of the report or in recommending the dividend pro-

(*s*) *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788; 65 L. J. Ch. 729; 44 W. R. 568; 74 L. T. 441; 12 T. L. R. 268; *R.* v. *Pulsford* (1828), 8 B. & C. 350.

(*t*) (1890), 2 Meg. 307; 59 L. J. Ch. 734; 63 L. T. 238. *Sed qu.*

(*u*) [1899] 2 Ch. 629; 68 L. J. Ch. 634; 48 W. R. 99; 81 L. T. 363; affd. in D. P. *nom. Dovey* v. *Cory*, [1901] A. C. 477; 70 L. J. Ch. 753; 50 W. R. 65; 85 L. T. 257; 8 Manson, 346; 17 T. L. R. 732.

CHAP. VI. posed by it. Under these circumstances the Court of Appeal held that, even if he knew that his name appeared in the report as a director, he was not liable for the statements contained in it or the recommendation of the dividend. A notice of resignation when once given cannot be withdrawn without the consent of the company (*v*).

Committee. Where directors delegate their powers to a committee, without any provision as to its acting by a quorum, the committee need not be unanimous; but all its acts must be done in the presence of all its members, and probably such a committee would have no power to add to its number or supply a vacancy (*w*).

Secretary or manager. The secretary or manager is an officer of great importance in a building society. The duties generally assigned to him by the rules are to attend the meetings of the society and the directors, and take minutes of the proceedings; to keep the accounts, and make out the annual account and statement; to send out notices; and to conduct the correspondence of the society; but, in practice, it often happens that almost the whole management of the society's affairs falls into his hands, and it is of great consequence, therefore, that he should be a thoroughly capable and trustworthy person.

Statutory provisions. The following statutory provisions apply to the secretary:—

(1) He must countersign the statutory receipt endorsed on a mortgage or further charge (*x*):

(*v*) *Glossop* v. *Glossop*, [1907] 2 Ch. 370; 76 L. J. Ch. 610; 97 L. T. 372.

(*w*) *Re Liverpool Household Stores Association* (1890), 59 L. J. Ch. 616; 62 L. T. 873; 2 Meg. 217.

(*x*) Building Societies Act, 1874, s. 42.

(2) He or some other officer (in practice it is usually the secretary) must prepare the society's annual account and statement (*y*), and may, under the rules, be liable, for default in making the return to the registrar, to a fine of 20*l*., and in the case of a continuing offence to an additional fine of 5*l*. a week (*z*); and will, for making a false return, be liable to a fine of 50*l*. (*a*):

(3) He must give notice to the registrar within seven days of any change of the chief office of the society (*b*):

(4) He can make a printed copy of the rules evidence by certifying it to be a true copy of the registered rules of the society (*c*):

(5) He is forbidden under heavy penalties to accept, in addition to his remuneration as prescribed by the rules, any gift, bonus, commission, or benefit for or in connection with any loan made by the society (*d*).

Documents to be signed by secretary.

The Regulations require the following documents to be signed by the secretary and three members of the society:—

(1) An application to register a new society, and the two printed copies of the rules by which the application must be accompanied (*e*):

(*y*) *Ibid.* s. 40; and see Building Societies Act, 1894, s. 2.
(*z*) Building Societies Act, 1894, s. 21.
(*a*) *Ibid.* s. 22.
(*b*) Building Societies Act, 1877, s. 2.
(*c*) Building Societies Act, 1874, s. 20, *ante*, p. 47.
(*d*) Building Societies Act, 1894, s. 23, *ante*, p. 153.
(*e*) Building Society Regulations, 1895, r. 2.

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(2) An application for the registration of an alteration of rules, whether partial or complete, and the two copies of the partial alteration, resolution for rescission of rule, or new rules by which the application is to be accompanied (*f*):

(3) The notice to the registrar of a change of name (*g*):

(4) An application to the registrar for a direction to transfer stock (*h*).

Liability of society for acts of secretary.

The following case on the liability of the society for the acts of its secretary occurred in Victoria:—The defendant, a member of the society, who had obtained an advance repayable in the usual way by instalments, verbally agreed with the secretary, who also carried on the business of an estate agent, that the secretary should collect the rents of the mortgaged property, and apply them in reduction of the mortgage debt. The secretary collected the rents accordingly and embezzled them. Under these circumstances a majority of the Court held that the receipt of the rents by the secretary (who under the rules was empowered to receive money on behalf of the society) must be deemed to be the receipt of the society, and that the defendant was entitled to set off the rents against the amount due under the mortgage (*i*).

(*f*) Building Society Regulations, 1895, rr. 4, 5.
(*g*) *Ibid.* r. 15.
(*h*) *Ibid.* r. 16.
(*i*) *South Melbourne Permanent Building and Investment Society and Deposit Institute* v. *Field* (1893), 19 Vict. L. R. 213; and see *Haverson* v. *Cole* (1857), 6 W. R. 17, where the purchaser of the equity of redemption of property in mortgage to the society paid instalments due under the mortgage to the manager who misapplied them.

In another case the secretary in his capacity as secretary used to sell shares for the members. He was also a stockbroker with an independent office of his own. The plaintiff placed his shares in the hands of the secretary for sale, but dealt with him not as secretary but as stockbroker. It was held that the society was not liable for the misappropriation by the secretary of the proceeds of sale of the shares (*j*).

In *Isted* v. *Brighton and Sussex Equitable Permanent Benefit Building Society* (*k*), the rules provided that the secretary should "keep the register of members, send all letters and circulars, conduct the correspondence of the society, and receive all moneys paid to the society and give a receipt for the same." The plaintiff executed a mortgage dated 5th August, 1909, to secure repayment by instalments, and in the following October, by arrangement with the secretary, paid him a lump sum of 403*l*. 8*s*. to redeem a previous mortgage on the property. The secretary absconded with the money. It was held that this was a good payment, and that the society must re-convey the property and return the deeds.

Where the secretary paid cheques belonging to the society (which he was authorized to endorse on their behalf) into his own private bank instead of into the society's bank, as he was instructed to do, it was held that the bank being holders in good faith and for value, and without notice of any defect in the secretary's title,

(*j*) *Blythe* v. *Napier Starr-Bowkett Building Society* (1907), 26 N. Z. L. R. 674.

(*k*) Building Societies' Gazette, 1911, p. 9, Swinfen Eady, J.

CHAP. VI. were not liable to the society for the amount which they had received in respect of the cheques (*l*).

Liability of secretary for the acts of his clerk.

The secretary will be liable for the acts of his clerk. Thus, where the secretary employed a private clerk, who assisted him in transacting the business of the society, and the directors from time to time, with the knowledge and assent of the secretary, handed cheques to this clerk for the purpose of being paid to withdrawing members, though according to the rules the directors ought themselves to have paid the cheques to the withdrawing members direct, and the clerk misappropriated the cheques, it was held that the secretary was liable to make good the sums so appropriated (*m*).

Secretary as agent.

Where the directors had allowed the secretary from time to time to pay a commission to persons who introduced borrowers, the society were held liable on a contract by the secretary to pay such a commission (*n*).

Mortgage of shares by secretary.

If the secretary mortgage his shares in the society to a third party, this is not notice to the society of the fact of the mortgage; see *Building Societies Shareholders' Association* v. *Smee*, cited *post*, p. 211.

Salary of secretary.

The secretary generally receives as remuneration for his services either a fixed annual salary, or a sum varying in amount according to the number of members in the society. Where the rules provided that the salary of the secretary should be at the rate of 30*l*. for members up to 300, 35*l*. for members from 300 to 400, and 45*l*. for members from 400 to 500, which amount might

(*l*) *Liquidators of Cape of Good Hope Building Society* v. *Bank of Africa* (1900), 17 S. C. R. 480.
(*m*) *Ex parte James* (1883), 49 L. T. 530; 48 J. P. 54.
(*n*) *Cooper* v. *Western Suburban Building Society*, 10th Nov. 1903, Clerkenwell County Court, Judge Edge.

be altered at any annual meeting, and was to be paid quarterly, the registrar held that the salary was a yearly salary, payable quarterly, and its amount was to be ascertained at the beginning of each year, without being liable to increase or diminution during the year by any alteration in the number of members, and that "members" meant individual members and not groups of shares (*o*).

False balance-sheets.

A secretary or manager who prepares false and misleading balance-sheets will be held personally liable for the consequences (*p*).

Embezzlement by secretary.

It has been held that the secretary of an unincorporated society is a servant who can be indicted for embezzling the money of the society (*q*).

Register of mortgages.

It is very important that the secretary should keep an accurate register of the mortgages made to the society, and also of all notices received from subsequent incumbrancers; the omission to do this may involve the society in serious liability (*r*).

Bankruptcy petition.

A bankruptcy petition by the society against an advanced member may be signed on its behalf by the secretary if duly authorized in that behalf (*s*).

Auditors.

Auditors are necessary officials in the case of a build-

(*o*) *Porter* v. *Chelmsford* 661*st Starr-Bowkett Building Society*, May 20th, 1892.

(*p*) *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887), 36 Ch. D. 787; 57 L. J. Ch. 46; 36 W. R. 322; 57 L. T. 684; cited *post*, p. 185; *Municipal Freehold Land Co.* v. *Pollington* (1890), 2 Meg. 307; 59 L. J. Ch. 734; 63 L. T. 238. See also Building Societies Act, 1894, s. 22, *ante*, p. 93.

(*q*) *R.* v. *Redford* (1869), 11 Cox, C. C. 367; 21 L. T. 508; and see *R.* v. *Haster* (1863), 1 N. R. 335.

(*r*) See *West London Bank* v. *Reliance Building Society* (1885), 29 Ch. D. 954; 53 L. T. 442.

(*s*) See *Re Tovey* (1910), 26 T. L. R. 456, cited *infra*, p. 285.

CHAP. VI. ing society, and the rules must prescribe the manner in which they are to be appointed, remunerated, and removed (*t*).

Who may be. Notwithstanding anything in the rules of any incorporated society, one at least of the auditors of the society must be a person who publicly carries on the business of an accountant (*u*).

Statutory duties. The following statutory duties appear to be imposed upon the auditors:—

(1) They must attest the annual account and statement of the society (*v*), and every auditor in attesting any such annual account or statement, must either certify that it is correct, duly vouched, and in accordance with law, or specially report to the society in what respect he finds it incorrect, unvouched, or not in accordance with law (*w*):

(2) They must inspect, once in every year at least, the mortgages and other securities belonging to the society (*x*), and every auditor must certify that he has at that audit actually inspected the mortgage deeds and other securities belonging to the society, and must state the number of properties with respect to which the deeds have been produced to and actually inspected by him (*y*).

Signature of certificate. The name of every auditor who signs the return must

(*t*) Building Societies Act, 1874, s. 16 (6).
(*u*) Building Societies Act, 1894, s. 3.
(*v*) Building Societies Act, 1874, s. 40.
(*w*) Building Societies Act, 1894, s. 2 (2).
(*x*) Building Societies Act, 1874, s. 40.
(*y*) Building Societies Act, 1894, s. 2 (2).

be given in the form of certificate of auditors, and *vice versâ* every auditor mentioned in the certificate must sign the form. Where the accounts of a society are found by the auditors to be incorrect, unvouched, or not in accordance with law, the auditors should sign that portion only of the certificate which relates to inspection of securities, and should make a special report to the society (not to the directors). A copy of such report should be sent to the registrar with the return. Where a firm of accountants acts as auditors to a society, the name of the particular member of the firm who personally conducted the audit and inspected the securities should be mentioned in the certificate of auditors, and he should sign the certificate. The signature of a firm is not a sufficient compliance with the Act, inasmuch as the duties can only be performed by an individual person.

Liability of auditor for negligence.

An auditor must use due diligence in the discharge of his duties, and may be made personally liable for the consequences if he fails to do so: see *Leeds Estate Building and Investment Co.* v. *Shepherd* (*z*). In that case the directors of a company, relying on accounts which they never properly investigated, paid dividends to the shareholders at the rate of 5 per cent., paid remuneration to themselves on a corresponding scale, and under the authority of a resolution of the company paid bonuses to the manager, all these payments being in fact made out of capital. The balance-sheets on which the dividends were declared were prepared not by the directors, but by the manager. They were de-

(*z*) (1887), 36 Ch. D. 787; 57 L. J. Ch. 46; 36 W. R. 322; 57 L. T. 684, where the proceeding was by action.

CHAP. VI. lusive, they over-estimated the assets of the company, and were framed with the object of showing a profit available for a dividend. The auditor never looked at the articles of association, but accepted the statements of the manager, and certified from time to time that the accounts submitted to him were true copies of those shown in the books of the company. No proper statement of income and expenditure or auditor's report was ever laid before the company. The directors did not know the true state of the company's affairs, or that the balance-sheets were delusive. They never exercised any judgment with reference to the accounts, but relied entirely on the manager and auditor. Under these circumstances the Court held that the directors were jointly and severally liable to make good all sums improperly paid out of capital in respect of dividends to the shareholders, directors' remuneration, and bonuses to the manager; and further, that it was the duty of the auditor in auditing the accounts of the company not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association, and was properly drawn up so as to contain a true and correct representation of the state of the company's affairs; and as the improper payments by the directors were the natural and immediate consequence of breach of duty on the part of the manager and the auditor, the manager and auditor were held liable in damages to the amounts so paid, except, in the case of the auditor, who had pleaded the Statute of Limitations, so much thereof as was covered by the statute. Again, where

an auditor presented a confidential report to the directors calling their attention to the insufficiency of the company's securities and the difficulty of realising them, but in his report to the shareholders merely stated that the value of the assets was dependent on realisation, with the result that the shareholders were deceived and a dividend was declared out of capital and not out of income, he was made liable (*a*). But an auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is not an insurer; he is only bound to exercise a reasonable amount of care and skill in his inquiries and investigations into the company's position, and if he has done this he has discharged his duty (*b*).

Solicitor and surveyor.

A solicitor and a surveyor, though in practice usually appointed, are not specially mentioned in the Building Societies Acts among the officers, and there are no statutory provisions relating to them, except sect. 23 of the Act of 1894, which forbids them to receive any bonus or commission for or in connection with any loan made by the society (*c*). But the solicitor, though not *primâ facie* an "officer" of the society, may, under

(*a*) *Re London and General Bank* (No. 2), [1895] 2 Ch. 673: 64 L. J. Ch. 866; 44 W. R. 80; 73 L. T. 304; 2 Manson, 555; 12 R. 520, where the proceeding was by misfeasance summons under the Winding-up Act of 1890; and see further as to an auditor's liability under that Act, *post*, p. 369.

(*b*) *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279; 65 L. J. Ch. 673; 74 L. T. 568; 3 Manson, 171. See further as to the duties and liabilities of auditors, *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; 83 L. J. Ch. 226; 109 L. T. 741; 110 L. T. 141; 30 T. L. R. 78; 58 Sol. J. 173, and as to their right of access to the books, *Cuff* v. *London and County Land and Building Co.*, [1912] 1 Ch. 440; 81 L. J. Ch. 426; 106 L. T. 285; 19 Manson, 166; 28 T. L. R. 218, C. A.

(*c*) Building Societies Act, 1894, s. 23, *ante*, p. 153.

CHAP. VI. special circumstances, be held liable as such under sect. 215 of the Companies (Consolidation) Act, 1908; see *post*, p. 370. The services of these officers are chiefly required in connection with the advances made by the society, the surveyor advising the board on the value of the property offered as security for the advance, and the solicitor advising on the title and preparing the mortgage deed. It is usual to pay them according to a fixed scale, which is less than the ordinary rate of payment; but it is a great error to fix the scale too low, as much of the success of the society will depend on the way in which the duties of these officers are discharged, and it is impossible to obtain proper professional advice without offering an adequate remuneration.

Where the solicitor lost mortgage deeds held by him on behalf of the society, they recovered judgment against him for the value of the property to which the deeds related, reducible to 1*s.* in the event of the deeds being handed over (*d*).

Terms of surveyor's employment.

As to the terms on which the surveyor of a building society has been held to give his services, see *Alexander* v. *Worman* (*e*). In that case the surveyor of an unincorporated society did certain work on behalf of the society. The society collapsed for want of funds, whereupon the surveyor brought an action for his commission against one of the managing directors. The Court held that there was no proof that the defendant

(*d*) 15*th Starr-Bowkett Building Society* v. *Medcalf*, Building Societies Gazette, 1903, p. 71.

(*e*) (1860), 6 H. & N. 100; 30 L. J. Ex. 198; 3 L. T. 477; 25 J. P. 312.

had ever contracted that he, or he and his fellow-directors, would pay the plaintiff for his services; and Martin, B., in delivering judgment, said: "We think it a mistake to suppose that, in societies of the kind, the surveyor or secretary or the officers do work and labour upon the same terms as professional men of their class ordinarily do. They generally have a much greater interest in them than the directors, and in the great majority of cases are the individuals who get them up, and at whose request the directors consent to accept the office and take upon themselves the liabilities and duties of their situation; and it is to us very clear that such officers discharge duties and perform services with the understanding on all hands that they are to be remunerated out of the funds, and that if the funds fail the officers must remain unpaid." It is conceived that this decision must be acted on with some caution in the case of an incorporated society, the Act of 1874 expressly providing that the manner of remunerating the officers shall be stated in the rules (*f*).

Corrupt agreement to appoint.

In one case a person desirous of being appointed surveyor to a proposed society, agreed, in the event of his obtaining the appointment, to pay one of the promoters a fee of three guineas. The society was duly constituted, under rules which provided that the officers, including the surveyor, should be appointed by the promoters, and the appointment having been made, the promoter sued the surveyor for the promised fee. A Divisional Court (Lord Coleridge, C. J., and Mathew, J.) held that, as the plaintiff was one of the persons

(*f*) Building Societies Act, 1874, s. 16, sub-s. 6.

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whose duty it was to appoint, and he would thus have an interest to appoint a particular person, the agreement was clearly corrupt and illegal, and could not be enforced (*g*).

Liability of surveyor for negligence.

The surveyor is bound to use reasonable care and skill in the discharge of his duties, and he will be answerable in damages for any failure in this respect; for "every person, employed as a surveyor, must use due diligence" (*h*). Thus, where the society advanced 350*l.* on mortgage on the faith of a report, negligently made by their surveyor, that the property was worth 464*l.*, whereas its real value was only 216*l.*, the society recovered as damages the difference between the amount advanced and the real value, viz. 134*l.* (*i*).

But, in the absence of fraud, no damages can be recovered in such a case unless the plaintiffs prove a contract between themselves and the surveyor; thus, if the surveyor had been employed by the member to whom the advance was made, the society would have had no remedy against him, however negligent he might have been (*j*).

B. *Unincorporated Societies.*

Position of officers of unincorporated societies.

What has been said above as to the powers and duties of the directors and other officers applies also, generally

(*g*) *Starr* v. *Wall* (1889), 6 T. L. R. 108.

(*h*) *Moneypenny* v. *Hartland* (1824), 1 Car. & P. p. 354, *per* Abbott, C. J.

(*i*) *London Caledonian Building Society* v. *Deverell*, January 15th, 1894; and see *Scholes* v. *Brook* (1891), 63 L. T. 837; 64 L. T. 674; W. N. 16, 101.

(*j*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353; 41 W. R. 468; 68 L. T. 626; 4 R. 274; 57 J. P. 484; *Scholes* v. *Brook, ubi sup.*

speaking, in the case of unincorporated societies, except that—

(1) There must necessarily be a treasurer or a trustee or trustees in whom the society's property may be vested, and in whose name actions by and against the society may be instituted;

(2) The statutory provisions which apply are those of the Act of 1836 and the old Friendly Societies Acts of 1829 and 1834 incorporated with it, with the addition now of sect. 40 of the Building Societies Act, 1874.

Bound by the rules.

All the officers are bound by the rules, of which they are deemed to have full notice (*k*).

Society may appoint officers.

The society may appoint such treasurer, trustee, or other officers as it thinks necessary, and officers who have to receive or expend moneys of the society are bound, if the rules so require, to execute a bond with two sureties in the following form (*l*):—

Bond to be given by officers.

KNOW ALL MEN BY THESE PRESENTS, that we, A. B., of , treasurer [*or* trustee, &c.] of the Society established at , in the county of , and C. D. of , and G. H. of (as sureties on behalf of the said A. B.), are jointly and severally held and firmly bound to E. F., the present clerk of the peace [*or* town clerk] for the county [*or* county of a city, *or* county of a town, riding division, *or* place, *as the case may be*] of , in the sum of , to be paid to the said E. F. as such clerk of the peace [*or* town clerk], or his successor, clerk of the peace [*or* town clerk] of the said county [*or* county of a city, &c.] for the time being, or his certain attorney; for which payment well and truly to be made we jointly and severally bind ourselves, and each of us by himself, our and each of our heirs,

(*k*) 10 Geo. 4, c. 56, s. 8.
(*l*) *Ibid.* s. 11.

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executors and administrators, firmly by these presents, sealed with our seals. Dated the day of , in the year of our Lord .

WHEREAS the above-bounden A. B. hath been duly appointed treasurer [*or* trustee, &c.] of the Society established as aforesaid, and he, together with the above-bounden C. D. and G. H. as his sureties, *have* entered into the above-written bond, subject to the condition hereinafter contained; now, therefore, the condition of the above-written bond is such, that if the said A. B. shall and do justly and faithfully execute his office of treasurer [*or* trustee] of the said society established as aforesaid, and shall and do render a just and true account of all moneys received and paid by him, and shall and do pay over all the moneys remaining in his hands, and assign and transfer or deliver all securities and effects, books, papers, and property of or belonging to the said society in his hands or custody to such person or persons as the said society shall appoint, according to the rules of the said society, together with the proper or legal receipts or vouchers for such payments, and likewise shall and do in all respects well and truly and faithfully perform and fulfil his office of treasurer [*or* trustee, &c.] to the said society, according to the rules thereof, then the above-written bond shall be void and of no effect, otherwise shall be and remain in full force and virtue.

Sic.

How sued on.

In this form, it will be noticed, the clerk of the peace or town clerk is the obligee, and the Act provides that in the event of a forfeiture, the society may sue upon the bond in the name of the clerk of the peace for the time being, on giving him a full indemnity against costs (*m*). Since the Act of 1874, however, which provides that all things required to be done by or sent to the clerk of the peace under the Act of 1836 shall be done by or sent to the registrar (*n*), it would

(*m*) 10 Geo. 4, c. 56, s. 11.
(*n*) Building Societies Act, 1874, s. 7.

appear that proceedings on such a bond would have to be taken in the name of the registrar on a similar indemnity. As the use of the statutory form is not compulsory, the proper course now is for the bond to be given direct to the trustees of the society.

Committee.

The society may delegate all or any of its powers to a committee, but in all cases where a committee is appointed for any particular purpose, its powers must be reduced into writing and entered in a book by the secretary or clerk of the society, and a majority of the members of such committee must always concur in any of its acts. The committee, in all things delegated to them, act for and in the name of the society; but their transactions must be entered in a book belonging to the society, and are subject to the review, allowance or disallowance, and control of the society, as directed by its rules (*o*).

Investment of surplus funds.

The treasurer or trustee of the society may, with its consent, lay out surplus funds not immediately required for the society's purposes, in any of the modes mentioned in the Act of 1829 (*p*).

Treasurers, &c. to render accounts, and pay over balances, &c.

Every person having or receiving any of the moneys, effects, or funds of the society, or entrusted with the disposal, management, or custody thereof, or of any securities, books, papers, or property relating to the same, his executors, administrators, and assigns respectively, must, upon demand made, or notice in writing given or left at his last or usual place of residence,

(*o*) 10 Geo. 4, c. 56, s. 12.
(*p*) *Ibid.* s. 13; see *ante*, p. 118.

CHAP. VI. in pursuance of any order of the society, or committee to be appointed for that purpose,

(a) Give in his account at the usual meeting of the society, or to such committee, to be examined and allowed or disallowed; and

(b) Pay over all moneys remaining in his hands, and deliver up all securities and property, taken or standing in his name, or being in his hands or custody, to the treasurer or trustee for the time being, or to such other person as the society or committee shall appoint:

and in case of neglect or refusal so to do, a summary order may be made against him on petition (*q*).

Justices may hear cases of fraud, and punish by fine or imprisonment.

If any officer, member, or any other person being or representing himself to be a member of the society, or the nominee, executor, administrator, or assignee of any member, or any other person whatever, shall by any false representation or imposition fraudulently obtain possession of the moneys of the society, or, having in his possession any sum of money belonging to the society, shall fraudulently withhold the same, and for which offence no especial provision is made in the rules of the society, he may be summoned before the justices, who may award the society double the amount of the money so fraudulently obtained or withheld, together with costs not exceeding ten shillings, to be levied by distress, and, in default of any distress being found, the offender is liable to three months' hard labour (*r*).

(*q*) 10 Geo. 4, c. 56, s. 14; *Re Briton Ferry Society* (1852), 1 W. R. 50; *Re Heanor Friendly Society* (1838), 1 Beav. 508; *Re Lord Hill Friendly Society* (1838), 2 J. P. 84.

(*r*) 10 Geo. 4, c. 56, s. 25.

Property of society vests in treasurer or trustee for the time being without conveyance.

The assets and property of the society vest in the treasurer or trustee for the time being, and after the death or removal of any treasurer or trustee vest in the succeeding treasurer or trustee, for the same estate and interest as the former treasurer or trustee had therein, and subject to the same trusts, without any assignment or conveyance, except the transfer of stocks and securities in the public funds of Great Britain and Ireland. The treasurer or trustee for the time being may bring and defend actions in respect of the society's property, provided he shall have been thereunto duly authorized by the consent of the majority of members present at any meeting of the society or committee thereof, and no such action will abate by reason of his death or removal from office (*s*).

Probably the true construction of the above provision is that securities taken in the name of the treasurer vest in his successors, and if taken in the name of the trustee or trustees vest in the succeeding trustee or trustees (*t*).

The trustees for the time being can sue on securities given to their predecessors even in a case where the rules of the society provide that on the removal of a trustee he shall assign all securities to the succeeding trustees, and no such assignment has been made (*u*). But

(*s*) 10 Geo. 4, c. 56, s. 21. As to the personal liability of a trustee or treasurer against whom an action is brought, see *Wormwell* v. *Hailstone* (1830), 4 M. & P. 512; 6 Bing. 668; *Harrison* v. *Timmins* (1838), 4 M. & W. 510. The provision in sect. 21 that the trustee may sue and be sued relates only to the form of suing or be sued: (1860), *Price* v. *Taylor*, 5 H. & N. p. 544, *per* Wilde, B.

(*t*) *Morrison* v. *Glover* (1849), 4 Ex. p. 443, *per* Alderson, B.

(*u*) *Morrison* v. *Glover* (1849), 4 Ex. 430; 19 L. J. Ex. 20;

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though actions are brought in the names of the trustees the society is the real litigant, and its board of management has power to give directions to the trustees as to any change of the solicitors employed in the litigation (*v*).

Trustees are joint tenants.

In *Walker* v. *Giles* (*w*), one of two trustees resigned and another was appointed in his stead. A question having arisen as to the effect of this appointment, Maule, J., said:—

"The effect of the 21st section of the 10 Geo. 4, c. 56, as it seems to me, is to make the continuing and the new trustees joint tenants. It operates as a new appointment of *all*."

Where, however, the amended rules of a society directed that three trustees should be appointed, of whom one should be treasurer, in whose names the funds of the society should be invested, and three trustees were appointed but a fourth person was appointed treasurer, the Court held that these three trustees could not sue the former treasurer for a balance in his hands on account of the society (*x*).

Removal of trustee.

In a case that occurred in New South Wales, where the language of the relevant Act was practically identical with that of sect. 21, it was held by a majority of the High Court of Australia that the word

14 L. T. (O. S.) 204; 14 J. P. 84; and see *Cartridge* v. *Griffiths* (1817), 1 B. & Ald. 57.

(*v*) *Laskey* v. *Runtz* (1908), 24 T. L. R. 496; 124 L. T. Journ. p. 569; 52 Sol. J. p. 386.

(*w*) (1848), 6 C. B. 662; 18 L. J. C. P. 323; 13 Jur. 588; 13 L. T. (O. S.) 209.

(*x*) *Dewhurst* v. *Clarkson* (1854), 3 E. & B. 194; 23 L. J. Q. B. 247; 2 C. L. R. 1143; 18 Jur. 693; 23 L. T. (O. S.) 109; 18 J. P. 535.

"removal" was not to be restricted to compulsory removal by the Court or the society, and that the acceptance of the resignation of a trustee by the board and the appointment of a new trustee in his place was a 'removal' within the meaning of the Act, and therefore that upon the appointment of the new trustee the property of the society, real and personal, vested forthwith in the new and continuing trustees without any conveyance or assignment by the retiring trustee (*y*).

Appointment of new trustees of unincorporated society.

There is no provision in any of the Acts by which unincorporated societies are governed for registering appointments of new trustees. This being a serious disadvantage with reference to the proof of title to land, a practice grew up of inserting the names of the trustees in the rules, and appointing new ones by alteration of rules, or of providing by rule that any new appointments should be certified as alterations. It is only as an alteration of rules therefore that appointments of new trustees can be certified.

Limitation of responsibility of treasurers or trustees.

No treasurer, trustee, or other officer is liable to make good any deficiency which may arise in the funds of the society, unless he shall have declared by writing under his hand, deposited and registered in like manner with the rules of the society, that he is willing so to be answerable; and he may limit his responsibility to such sum as shall be specified in any such writing; but he is personally responsible and liable for all moneys actually received by him on account of the society (*z*).

Liability of officers of society.

This provision does not increase the liability of the

(*y*) *Heydon* v. *Lillis* (1907), 4 C. L. R. 1223; 7 S. R. 684; 14 A. L. R. 89.

(*z*) 10 Geo. 4, c. 56, s. 22.

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treasurer of a building society beyond that of a bailee, in respect of the loss of money immediately after its receipt. Thus, where an action was brought against a guarantee association to make good a sum of 170*l.* which a treasurer, for whom they were sureties, had received, and of which he had been immediately robbed, the Court held that they were not liable (*a*).

Trustees acting ministerially only not liable.

In *Grimes* v. *Harrison* (*b*), the directors of a building society misapplied 800*l.*, part of the funds of the society. The cheques for this sum were signed by the trustees, but as they had acted only ministerially and by the order of the directors the Court held that they were not liable, notwithstanding there was some informality in the authority given to them by the directors. As the trustees, however, instead of simply relying upon their position as mere servants of the directors, took upon themselves to defend and support the transactions in question, they got no costs.

But where two members of a building society, acting as trustees *pro hâc vice* and not being the general trustees of the society, concurred in a transaction which was *ultra vires* and not acquiesced in by all the members, and in the course of it entered into personal covenants for the payment of money under which they were subsequently made liable, it was held that they could not compel contribution among the shareholders to recoup their loss (*c*). The decision would no doubt have

(*a*) *Walker* v. *The British Guarantee Association* (1852), 21 L. J. Q. B. 257; 16 Jur. 885; 19 L. T. (O. S.) 87; 16 J. P. 582.
(*b*) (1859), 26 Beav. 435; 28 L. J. Ch. 823; 5 Jur. N. S. 528; 33 L. T. (O. S.) 115; 23 J. P. 421.
(*c*) *Re Kent Benefit Building Society* (1861), 1 Dr. & S. 417; 30 L. J. Ch. 785; 7 Jur. N. S. 1045; 9 W. R. 686; 25 J. P. 805; 4 L. T. 610.

been the same had they been the general trustees of the society.

Trustees out of the jurisdiction.

Provision is made by sects. 15 to 19 of the Act of 1829 (*d*) for the conveyance of land or other property in the case of a trustee being out of the jurisdiction, or an idiot, or lunatic, or of unsound mind, or if it shall be unknown or uncertain whether he is living or dead, or if he refuses to convey to the person duly nominated trustee in his stead, and for the transfer of stock and payment of dividends in similar cases; but the procedure under these sections appears to be now obsolete.

Priority of debts due to the society.

One special privilege of unincorporated societies under the Friendly Societies Act of 1834 remains to be noticed and appears to be still available in certain cases, viz., a right to priority of payment out of the assets of their officers. This is derived from sect. 12 of the Act (*e*), which provides that if any officer entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office, any moneys or effects belonging to the society, or any deeds or securities relating to the same, shall die, or become insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands or goods, or make any assignment thereof for the benefit of his creditors, his heirs, executors, administrators, or assignees, or other persons having legal right, or the officer executing such process, or the party using

(*d*) 10 Geo. 4, c. 56, ss. 15—19; *Ex parte Armstrong* (1848). 16 Sim. 296; *Re Eclipse Association* (1854), Kay, App. xxx.; 23 L. J. Ch. 280; 2 Eq. Rep. 318.

(*e*) 4 & 5 Will. 4, c. 40, s. 12.

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Bankruptcy.

The priority formerly extended to the case of bankruptcy also, but this is now abolished; nor is there now any priority in the case of a deceased officer who has died insolvent (*f*).

Priority, when allowed.

The preference is only allowed in respect of moneys, &c., in the hands of an officer of the society strictly so called (*g*); and the money must be in his hands *virtute officii* and not under any contract (*h*). So, where the money came to his hands not in the course of his duty but in an entirely irregular manner, the preference was not allowed (*i*). The right given is one against the common rights of his Majesty's subjects, and therefore

(*f*) Bankruptcy Act, 1914, s. 33; *Ex parte Bailey* (1854), 5 De G. M. & G. 380; 23 L. J. Bkcy. 36; 18 Jur. 988.

(*g*) *Ex parte Whipham* (1844), 3 M. D. & De G. 564; 13 L. J. Bkcy. 8; 2 L. T. (O. S.) 426; *Ex parte Orford* (1852), 1 De G. M. & G. 483; 16 Jur. 851; *S. C. nom. Ex parte Oxford*, 21 L. J. Bkcy. 31; *Ex parte Harris* (1845), De G. 162; 14 L. J. Bkcy. 25.

(*h*) *Ex parte Stamford Friendly Society* (1808), 15 Ves. 280; *Ex parte Fleet* (1850), 4 De G. & Sm. 52; 19 L. J. Bkcy. 10; 14 Jur. 685; *Re Shattock* (1861), 5 L. T. 370; *Re Aberdein* (1896), 13 T. L. R. 7; W. N. 154; and see *Re Heanor Friendly Society* (1838), 1 Beav. 508, where the money had been placed in the hands of an officer jointly with another person.

(*i*) *Locke* v. *Public Trustee* (1886), 5 N. Z. L. R. 241.

those who claim that right must bring themselves within the express provisions of the statute (*j*). But an agreement on the appointment of a treasurer that he shall pay interest on part of the sum placed in his hands will not deprive the society of their statutory priority (*k*). Nor will the priority be lost by reason of the officer having been allowed improperly to retain the money (*l*); nor is it necessary that the money or property should be capable of being specifically identified (*m*). And where the treasurer was a partner in a banking firm and the money did not go through his hands but was paid directly to the bank to the credit of the trustees, it was held on the firm becoming bankrupt that the trustees had priority for their balance (*n*).

Officer must be a natural person.

The officer against whom and against whose estate the preferential right is given must be a natural person and not a corporation: see *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (*o*), where a friendly society unsuccessfully attempted to obtain priority of payment out of the

(*j*) *Per* Fry, J., *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (1879), 11 Ch. D. p. 771; 27 W. R. 596.

(*k*) *Ex parte Ray* (1839), 3 Dea. 537; 1 Mont. & Ch. 50.

(*l*) *Re Welch* (1894), 70 L. T. 691; 63 L. J. Q. B. 524; 42 W. R. 320; 1 Manson, 62; 10 R. 140.

(*m*) *Re Atkins, Ex parte Edmunds* (1882), 51 L. J. Ch. 406; 30 W. R. 432; 46 L. T. 240; *Re Miller, Ex parte Official Receiver,* [1893] 1 Q. B. 327; 62 L. J. Q. B. 324; 41 W. R. 243; 68 L. T. 367; 57 J. P. 469; 4 R. 256; 10 Morr. B. R. 21; *Re Eilbeck,* [1910] 1 K. B. 136; 79 L. J. Q. B. 265; 101 L. T. 688; 17 Manson, 1; 26 T. L. R. 111; 54 Sol. J. 118.

(*n*) *Ex parte Riddell* (1842), 3 M. D. & De G. 80; 7 Jur. 21; and see *Ex parte Burge* (1841), 1 M. D. & De G. 540; 5 Jur. 346, where the treasurer had invested money of the society upon an insufficient security.

(*o*) (1879), 11 Ch. D. 768; 27 W. R. 596.

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assets of a bank, then in liquidation, which had been acting as the society's treasurer.

Priority not lost by neglect of society to examine accounts.

Where the secretary of a building society, the rules of which provided that the secretary's accounts should be regularly presented and audited, misappropriated the moneys of the society that came to his hands, Jessel, M. R., held that the society's want of due diligence in examining the accounts was no bar to their claim (*p*).

(*p*) *Moors* v. *Marriott* (1878), 7 Ch. D. 543; 47 L. J. Ch. 331; 26 W. R. 626; 42 J. P. 452; and see also as to negligence by the society, *Absolom* v. *Gething* (1863), 32 Beav. 322; 32 L. J. Ch. 786; 9 Jur. N. S. 1263; 8 L. T. 132.

CHAPTER VII.

THE RIGHTS AND LIABILITIES OF MEMBERS.

I. *Incorporated Societies.*

Different classes of members.

IT has already been observed (*a*) that the members of a building society are of two classes—those who simply pay their contributions to the society, generally receiving interest in some shape on the amount so paid; and those who borrow money from the society on mortgage. The former are called unadvanced or investing members; the latter advanced or borrowing members, and their rights and liabilities depend not only on the rules of the society, but also on the contract of mortgage into which they have entered. The nature of the mortgages given to a building society by its advanced members, and the cases that have been decided in relation to these securities, will be considered in Chapter VIII., *infra*. For the purpose of raising the funds necessary for carrying on its business an incorporated society is empowered to issue shares of one or more denominations, either paid up in full, or to be paid by periodical or other subscriptions, and with or without accumulating interest, and to repay such funds when no longer required for its purposes (*b*); and it may also issue preference shares. But in the case of

(*a*) See *ante*, p. 1.
(*b*) Building Societies Act, 1874, s. 13.

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every society established, or substituting a new set of rules for its existing rules, since August 25th, 1894, the manner in which the stock or funds is or are to be raised; the terms upon which unadvanced subscription shares are to be issued; the manner in which the contributions are to be paid to the society, and withdrawn by the members, with tables, where applicable, showing the amount due by the society for principal and interest separately; the terms upon which paid-up shares, if any, are to be issued and withdrawn, with tables, where applicable, showing the amount due by the society for principal and interest separately; whether preferential shares are to be issued, and, if so, within what limits (*c*); the manner in which advances are to be made and repaid; the deductions, if any, for premiums, and the conditions upon which a borrower can redeem the amount due from him before the expiration of the period for which the advance was made, with tables, where applicable, showing the amount due from the borrower after each stipulated payment; the manner in which losses are to be ascertained and provided for, and the manner in which membership is to cease—must all be set forth in the rules of the society (*d*).

Stock or funds of incorporated society.

It is obvious, therefore, that the society may raise its funds in a number of different ways, and the rights of the members will vary accordingly. There is no fixed capital as in the case of a joint-stock company, but shares are issued from time to time as persons are

(*c*) As to preferential shares, see *ante*, p. 40.

(*d*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1.

found ready to take them (*e*); and (unless so provided by the rules) there is no limit to the number that may be issued. In the case of terminating societies, however, it is unusual for anyone to join after the first few months of the society's existence, owing to the number of back payments that will be required in order to place him on an equality with those members who joined at the commencement of the society. CHAP. VII.

Entrance fee.

It is usual to charge a member who joins the society for the first time a small sum by way of entrance fee.

Who may be members.

Speaking generally, anyone may become a member of a building society, but special provisions apply in the case of certain classes of members, which must be noticed.

Infants.

An infant may be admitted as a member provided the rules of the society do not prohibit such admission, and may give all necessary acquittances; but during his non-age he cannot vote or hold any office in the society (*f*), nor, it would seem, can he transfer shares standing in his name (*g*). An infant member can consent to a dissolution of the society under an instrument of dissolution (*h*), or present a petition for winding-up, acting, of course, by a next friend, who is responsible for costs (*i*), or forgo an appropriation to which he has become entitled (*j*); but he cannot execute a mortgage

(*e*) See *ante*, p. 10.
(*f*) Building Societies Act, 1874, s. 38.
(*g*) *Clifford* v. *Rochester and District Starr-Bowkett Building Society*, Reg. Rep. for 1881, p. 39, cited in Davis on Building Societies, 4th ed. p. 85.
(*h*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 44 W. R. 476; 74 L. T. 270; 12 T. L. R. 251.
(*i*) *Ibid.*, [1896] 1 Ch. p. 617, *per* North, J.
(*j*) *Whitehead* v. *Chelsea District Mutual Benefit Building Society*, Reg. Rep. for 1901; and see *Cook* v. *Chatham, &c.*

CHAP. VII. to the society; see *Nottingham Permanent Benefit Building Society* v. *Thurstan*, cited *post*, p. 267. As to withdrawal by an infant, see *infra*, p. 250.

Married women.

By the Married Women's Property Act, 1882, married women are rendered capable, in general terms, of acquiring and holding property, and of contracting in respect of and to the extent of their separate property as if they were unmarried (*l*). The Act further contains the following special provisions as to building societies:—All shares and interests in any building society which, on January 1st, 1883, were standing in the name of a married woman are to be deemed to be her separate property until the contrary is shown, and the fact that they are standing in her sole name is sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use so as to authorize her to receive or transfer the same, and to receive the dividends without the concurrence of her husband, and to indemnify the directors, managers, and trustees of the society in respect thereof (*m*); and all shares and interests which, since January 1st, 1883, may be placed or transferred in or into the sole name of any married woman are deemed, until the contrary is shown, to be her separate property in respect of which her separate estate

Starr-Bowkett Building Society, March, 1879, cited in Scrat. & Brab. on Building Societies, 2nd ed. p. 45, n., where it was held by the registrar that the appropriation might be sold for the infant's benefit by her guardian.

(*k*) [1903] A. C. 6; 72 L. J. Ch. 134; 51 W. R. 273; 87 L. T. 529; 19 T. L. R. 54; 67 J. P. 129.

(*l*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; and see Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), ss. 1 and 4). As to Scotland, see Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21).

(*m*) Married Women's Property Act, 1882, s. 6.

will alone be liable (*n*). These provisions also apply, so far as the married woman's interest is concerned, to shares and interests standing in the name of herself jointly with any person or persons other than her husband (*o*), and the husband's concurrence in any transfer is unnecessary whether the shares are standing in the name of the married woman alone, or in her name jointly with some other person or persons (*p*). If, however, any investment in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any building society shall have been made by a married woman by means of moneys of her husband without his consent, the Court may order such investment and the dividends thereof, or any part thereof, to be transferred and paid to him (*q*).

Questions between husband and wife.

In any question between husband and wife as to the title to any property, either party, or the society in whose books any shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court, or to the judge of the County Court of the district in which either party resides, who may make such order as he thinks fit; and the society will in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only (*r*).

Married woman executrix or trustee.

A married woman who is executrix, administratrix, or trustee alone or jointly with any other person or

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 7.
(*o*) *Ibid.* s. 8.
(*p*) *Ibid.* s. 9.
(*q*) *Ibid.* s. 10.
(*r*) *Ibid.* s. 17.

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persons, may transfer or join in transferring any share or other interest of or in a building society in that character, without her husband, as if she were a *feme sole* (*s*).

Shares may be held by two or more persons jointly.

Two or more persons may jointly hold a share or shares in any incorporated society; and all shares held jointly by any two or more persons in any society subsisting on November 2nd, 1874 (the time appointed for the commencement of the Act of that year), the rules of which do not prohibit such joint holding, are to be deemed to be lawfully so held (*t*).

The latter part of this provision applies, it would seem, to all societies in existence on November 2nd, 1874, whether they have obtained a certificate of incorporation under the Act of 1874 or not.

For the purpose of consenting to a dissolution of the society, joint holders of a share are to be considered one member, and must all sign the instrument of dissolution; but a member who holds shares both jointly and severally need not sign in more than one place to testify consent in respect of all his shares (*u*).

Transfers into joint names.

Where a member transferred his shares into the joint names of himself and his daughter, though without her knowledge, it was held that the shares could not be re-transferred into his name without her consent (*v*). And where a member transferred a sum of money standing in his name in the books of the society into

(*s*) Married Women's Property Act, 1882, s. 18.
(*t*) Building Societies Act, 1874, s. 39.
(*u*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 44 W. R. 476; 74 L. T. 270; 12 T. L. R. 251.
(*v*) *Butler* v. *Bingley Building Society*, 17th June, 1903, Keighley County Court, Judge Bompas, K.C.

the joint names of himself and his wife, and died, it was held under the circumstances to be a gift to her (*w*). Where, however, there is no evidence that a gift was intended the transferor will still in equity remain the owner (*x*).

Joint-stock companies.

Whether a joint-stock company can become a member of an incorporated building society has never, so far as the writer is aware, been expressly decided. In *Dobinson* v. *Hawks* (*y*), the Vice-Chancellor of England expressed the opinion that a company could not become a member of an unincorporated society. This opinion, however—for it was no more—was founded on the language of the Act of 1836, and has no application, therefore, to the case of an incorporated society.

In a case that came before Mr. Justice Chitty, that learned judge was of opinion, though the point did not call for actual decision, that a company, whose memorandum of association authorized the acquisition of shares in other companies, might lawfully become a member of an incorporated society unless there was some provision in the Building Societies Acts to render such a holding unlawful (*z*).

(*w*) *Morton* v. *Leek United Permanent Building Society*, 14th June, 1904, Warrington, J.

(*x*) *Warrington* v. *Leek United Building Society*, 31st Oct. 1906, C. A.

(*y*) (1848), 16 Sim. 407; 12 Jur. 1037; 12 L. T. (O. S.) 238; the headnote in Simons goes too far. The report in the *Jurist* is the best.

(*z*) *Bristol and Clifton Permanent Building Society* v. *Harbour*. June 24th, 1886, 30 Sol. J. 586; 81 L. T. Journ. p. 171. As to the meaning of the word "person" in an Act of Parliament, and whether it includes a corporation, see *The Pharmaceutical Society* v. *The London and Provincial Supply Assoc. Limited* (1880), 5 App. Cas. 857; 28 W. R. 957; affirming the decision below, 5 Q. B. D. 310; 49 L. J. Q. B. 338; 28 W. R. 608; 42 L. T. 569; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560; 70

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Ultra vires investment.

Where a friendly society made an *ultra vires* investment of its funds in the shares of a building society, it was held in New South Wales that the friendly society was a creditor to the extent of the funds so invested (*a*), and so where a municipal council made a similar *ultra vires* investment (*b*).

Industrial and Provident Societies.

A society registered, or deemed to be registered, under the Industrial and Provident Societies Act, 1893, may, if its rules do not direct otherwise, invest any part of its capital in the shares or on the security of any society registered under the Building Societies Acts, provided that no such investment be made in the shares of any society other than one with limited liability; and a society so investing will be deemed to be a person within the meaning of the Building Societies Acts, and any investments made before September 12th, 1893, which would have been valid if the Act had been then in force, are ratified and confirmed (*c*).

Trustee in bankruptcy.

The trustee in bankruptcy of a member who has been made bankrupt is not a member (*d*).

Executors and administrators.

Similarly, the executors or administrators of deceased

L. J. K. B. 828; 49 W. R. 715; 85 L. T. 3; Interpretation Act, 1889 (52 & 53 Vict. c. 63), ss. 2, 19; and the judgments of the Court of Appeal in *Willmott* v. *London Road Car Co.*, [1910] 2 Ch. 525; 80 L. J. Ch. 1; 103 L. T. 447; 27 T. L. R. 4; 55 Sol. J. 873, a case of a lease.

(*a*) *Gilbert* v. *Newcastle Permanent Investment and Building Society* (1896), 17 N. S. W. R. 72, Eq.

(*b*) *Re Newcastle Permanent Investment and Building Society* (1897), 18 N. S. W. R. 76, Eq.

(*c*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 38, in substitution for Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 12, sub-s. 4, now repealed; and see sects. 41 and 42.

(*d*) *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, 670; 64 L. J. Ch. 427; 43 W. R. 417; 72 L. T. 411; 2 Manson, 257; 12 Rep. 218, *per* Lindley, M. R.

members, though they may be sued in their representative capacity in respect of the obligations of the deceased, are not members unless they do something to make themselves such (*e*). As to an executor becoming a member and obtaining an advance, see *post*, p. 266.

Depositors.

A person who merely deposits money with the society does not thereby become a member unless there is some rule to that effect (*f*).

Payment to registered owner.

Payment to a registered owner of shares, without notice that he is only a trustee, will discharge the society from liability to the real owner, even though the payment may have been attended with a certain amount of irregularity (*g*). So, where the secretary of a society executed transfers in blank to mortgagees and handed the certificates to them, but they gave no notice to the society, and he afterwards sold the shares, and the purchaser gave notice and got himself registered as owner, the purchaser was held entitled to priority, although the certificates expressly stated that the shares could not be dealt in until the return of the certificates (*h*).

In *Allan* v. *Urquhart* (*i*), the manager of an invest-

(*e*) *Ibid.*

(*f*) *Re Mutual Aid Permanent Benefit Building Society* (1885), 29 Ch. D. p. 189; *Hill's Case* (1870), 9 Eq. 605, where it was expressly provided by the terms of the deposit that the general rules of the society should be binding on depositors.

(*g*) *Nolloth* v. *The Simplified Permanent Benefit Building Society* (1885), 53 L. T. 859; 34 W. R. 73; 2 T. L. R. 97, North, J.

(*h*) *The Building Societies' Shareholders' Association* v. *Smee*, June 13th, 1899, Kekewich, J.

(*i*) (1887), 15 Rettie, 56; 25 Sc. L. R. 47; and see *Ex parte Boulton* (1857), 1 De G. & J. 163; 26 L. J. Bkcy. 45; 5 W. R. 445; 29 L. T. (O. S.) 71; 3 Jur. N. S. 425.

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ment society assigned his shares in the society as security for a loan. No notice was given to the directors, and no alteration was made in the shareholders' ledger, which was the only register of members kept by the society. In an action brought by the assignees against the society, it was held that the knowledge of the manager was not equivalent to knowledge on the part of the society, and that the society was not liable for a payment made to the manager on account of his shares after the date of the assignment.

Shares not within 9 Geo. 2, c. 36.

Shares in a building society, it was held, were not within the old Mortmain Act, 9 Geo. 2, c. 36, and might therefore be bequeathed to a charity (*j*).

Do not pass under bequest of 'moneys.'

A bequest of "all moneys, both in the house and out of it," will not carry shares in a building society (*k*); but deposits in two societies and a cash balance at one of them were held in Victoria to pass under the words "money and valuables" (*l*).

Donatio mortis causâ.

Building society shares are not the proper subject-matter of a *donatio mortis causâ* (*m*).

Instalments, when liable to arrestment in Scotland.

The instalments paid by a borrowing member of an unincorporated society, the rules of which provided that the borrower should take shares to the full amount of his loan, and that the instalments as they were paid should be carried to the credit of his share account, were held in Scotland to be not liable to arrestment, where at the date of the arrestment the amount of the loan

(*j*) *Entwistle* v. *Davis* (1867), 4 Eq. 272; 36 L. J. Ch. 825; 31 J. P. 708.
(*k*) *Collins* v. *Collins* (1871), 40 L. J. Ch. 541; 24 L. T. 780.
(*l*) *Cameron* v. *Hunter* (1891), 17 V. L. R. 217.
(*m*) *Re Weston, Bartholomew* v. *Menzies,* [1902] 1 Ch. 680; 71 L. J. Ch. 343; 50 W. R. 294; 86 L. T. 551; 18 T. L. R. 326.

made to the member exceeded the sum standing to his credit on his share account (*n*).

Limitation of liability of members.

The liability of the members of an incorporated society is expressly limited by the Act of 1874, sect. 14 of which is in the following terms:—

"The liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share, and in respect of any share upon which an advance has been made shall be limited to the amount payable thereon under any mortgage or other security or under the rules of the society."

Liability of members.

The liability of the two classes of members is therefore not the same. An investing member is liable only for the amount actually paid or in arrear on his shares; an advanced member is liable for the amount payable on his shares, either under the mortgage or other security, or under the rules of the society. The meaning of the section was discussed in *Brownlie* v. *Russell* (*o*). In that case the rules of the society provided that the shares should be of the value of 25*l*. each, payable by certain instalments, and should be treated as paid-up shares when the amounts to be credited to the member had arrived at the full sum of 25*l*. A member took twenty-eight shares, on which he obtained an advance of 700*l*. secured by mortgage in the usual way; when he had repaid instalments of principal to the amount of 414*l*., the society was ordered to be

(*n*) *Wilson* v. *Carrick* (1881), 18 Sc. L. R. 657.
(*o*) (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757; 10 Rettie (H. L.), 19; 20 Sc. L. R. 481; affirming, with a variation, the decision below, 8 Rettie, 917; 18 Sc. L. R. 661.

CHAP. VII. wound up. There were no outside creditors. The member having subsequently given notice of withdrawal under the rules, questions arose as to the terms on which he was entitled to withdraw. The Lord Chancellor (Earl of Selborne), in giving judgment in favour of the member, said:—

"Then the next thing which I observe (and it is so far common to both classes of members) is that this is a society in which the liability of each member is strictly limited in point of amount. The rules say that the shares shall be of the value of 25*l.* each, payable by certain instalments; and under the 5th rule they are to be treated as paid-up shares when the amounts to be credited to the member have arrived at the full sum of 25*l.* If there were nothing but the rules, I should say that this is a clear case of liability limited to the amount of 25*l.* per share. But, over and above the rules, the Act of 1874, under which the society is governed, says expressly, 'the liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share.' In favour, therefore, of the unadvanced member, the statute reduces the liability to a lower point than the full 25*l.*—he is only to be liable (which I think means either to creditors or to anybody else) for that which is actually in arrear at the time when the liability is to be enforced, in addition to what he has actually paid. The clause then goes on to state, 'And in respect of any share upon which an advance has been made, the liability of any member shall be limited to the amount payable thereon under any mortgage or other security

or under the rules of the society.' Now, under the rules of this society, no share is to be more than 25*l.* The liability, if it depended upon the rules alone, would be only 25*l.* per share, whether it was advanced or unadvanced. The mortgage in this case is given for the full amount which is advanced, namely, 25*l.* upon each of the twenty-eight shares held by the present respondent, making in the whole 700*l.*; and there is nothing whatever in the rules to increase the liability beyond the mortgage. The result is that, 25*l.* per share, or 700*l.* in the whole, having been advanced upon these shares, 414*l.* had been actually repaid by the instalments required under the rules before the winding-up order was made, and there remained to be made up in some way or other (that is, there remained payable) 286*l.* at that time. . . . Therefore the maximum sum required in order to reach the full limit of liability in respect of these shares was, at the date of the winding-up order, 286*l.*"

Liability of members.

In his judgment in *Re Sheffield and South Yorkshire Building Society* (*p*), where the question was as to the liability of a member who had withdrawn, Mr. Justice Cave seems to have expressed a different view of the meaning of the section. The learned judge said (*q*): "This is a case of a building society under the Building Societies Act of 1874, s. 9 of which provides that such society shall become a body corporate; and the result follows that the creditors must look to the corporate

(*p*) (1889), 22 Q. B. D. 470; 58 L. J. Q. B. 265; 60 L. T. 183; 53 J. P. 375; 5 T. L. R. 192.
(*q*) 22 Q. B. D. p. 477.

CHAP. VII. assets, and to them only, for payment of the debts of the society, unless they can show that some statute has imposed a liability on individuals, in addition to the liability which is established as against the effects of the corporate body. Nothing of that sort is to be found. The only thing to be found on that point is sect. 14, which (as I have said) is confined to the liability of members, and does not extend to the liability of past members. That is not only the object of the section, but the words themselves point in the same direction. 'The liability of any member of any society under this Act, in respect of any share upon which no advance has been made, shall be limited to the amount actually paid or in arrear on such share.' First, leave out the words 'or in arrear.' Suppose one man had been a member for a year and had paid 18*l.*, and another had been a member for two years and had paid 36*l.*, the liability of each would be limited to the amount actually paid, viz., 18*l.* or 36*l.* respectively, and, if more were demanded, it would be something *in addition* to what was paid. But there are the words 'amount in arrear,' which do, I think, enable the liquidators to call on existing shareholders to pay up their subscriptions, and these, when paid, are to be devoted to the discharge of the liabilities of the society. But I see nothing there which can apply to a man who has *ceased* to be a member, and who consequently has not and cannot have any arrears, because his payments have come to an end." And, further on in his judgment, the learned judge speaks of the liability of a member as limited to the amount already paid, "or which he has

to pay until maturity of his share." In another case (*r*), Lord Justice Lindley made some observations on sect. 14, and seemed to agree (though the report is not very clear) with the opinion expressed by Cave, J. It is submitted, with very great respect, that this is not the meaning of the section. The contract in the case of subscription shares is that the member shall pay so much per week or per month, as the case may be, and if he makes these payments regularly as they fall due, he is never in arrear, for no one can be said to be "in arrear" with a payment unless he has failed to make it at the stipulated time. The amount he has already paid into the hands of the society is no doubt liable to its debts, and must be dealt with accordingly; but if he has paid his subscriptions as they became due, he has done all that can be required of him, and neither in a liquidation nor under any other circumstances can he be made to pay anything more. In *Re United Service Share Purchase Society, Limited* (*s*), Neville, J., said: "The liability in the building society is limited in quite a different way, and in the case of the non-advanced members is limited to the arrears of the subscriptions which may be due at any particular time, and they are under no obligation to make up any fixed amount towards the funds of the society."

In a case that occurred in Victoria, where the language of sect. 16 of the local statute is practically identical with that of sect. 14 of the English Act of 1874, a member pledged certain investing shares, upon which some arrears were owing, to secure repayment

(*r*) *Sibun* v. *Pearce* (1890), 44 Ch. D. p. 372; 38 W. R. 658; 62 L. T. 388; 63 L. T. 123; 6 T. L. R. 262.
(*s*) [1909] 2 Ch. p. 537; 78 L. J. Ch. 713; 101 L. T. 273.

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of moneys due upon certain borrowed shares; it was held that the fact that an advance had been made on the investing shares did not make them "borrowed" shares, and that the member was only liable, so far as they were concerned, to pay up the amount of the arrears (*t*).

Liability continues unless membership is regularly determined.

A member will not be relieved from liability in respect of his shares by simply ceasing to pay subscriptions and treating the shares as abandoned. Unless further liability on the shares is regularly determined by death, notice of withdrawal, transfer, forfeiture, or otherwise, it will continue, and may be enforced at some subsequent time when perhaps the arrears have amounted to a very large sum. In a case of this kind that occurred, a member who had joined a society and paid an entrance fee, but no subscriptions, was held liable in a winding-up for arrears amounting to nearly fourteen hundred pounds.

See further as to the liability of unadvanced members, Chapter X., *post*, p. 383.

Rules are binding on members and others.

The rules of the society are binding on the several members and officers of the society, and on all persons claiming on account of a member, or under the rules, all of whom will be deemed and taken to have full notice thereof (*tt*). Tables appended to the rules are to be considered as forming part of the rules, and are binding accordingly (*u*).

(*t*) *Re Premier Permanent Building Land and Investment Association* (1896), 22 V. L. R. (Eq.) 466.

(*tt*) Building Societies Act, 1874, s. 21; and see the judgment of North, J., in *Barnard* v. *Tomson*, [1894] 1 Ch. 374; 63 L. J. Ch. 488; 8 R. 575; 70 L. T. 306.

(*u*) *Mockridge* v. *Taunton and West of England Perpetual Benefit Building Society*, Reg. Rep. for 1909.

And on the society.

The rules are no less binding on the society. In fact, they form the contract between the society and its members, and that contract can only be altered in the manner prescribed by the Act; any attempt on the part of the society to alter it in some other way, as, for instance, by a resolution passed by a majority of the members present at the annual meeting, will be nugatory (*v*).

Variation from rules.

As between the society and its members, a course of dealing at variance with the rules, for whatever length of time it may be pursued and acquiesced in, is of no validity whatever (*w*); nor does the fact that the funds have been systematically misapplied and the society converted into a freehold land society release the members from their obligation to observe the rules when called upon to do so (*x*).

Alteration of rules.

As to how far an advanced member is bound by an alteration of rules made subsequently to the date of his advance and imposing a greater burden upon him in the event of his desiring to redeem, see *post*, p. 287; and as to alterations of rules affecting withdrawing members, see *post*, p. 244.

Annual account.

Every member is entitled to receive from the society

(*v*) *Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197; 14 Rettie, 27; 24 Sc. L. R. 486; 35 W. R. 632; 56 L. T. 776; 3 T. L. R. 378.

(*w*) *Watson* v. *Bendigo Permanent Land and Building Society* (1884), 10 V. L. R. (Law), 26.

(*x*) *Grimes* v. *Harrison* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 5 Jur. N. S. 528; 33 L. T. (O. S.) 115; 23 J. P. 421; *Re Kent Benefit Building Society* (1861), 1 Dr. & Sm. 417; 30 L. J. Ch. 785; 7 Jur. N. S. 1045; 9 W. R. 686; 4 L. T. 610; 25 J. P. 805; *R.* v. *D'Eyncourt* (1864), 4 B. & S. 820; 9 L. T. 712; 28 J. P. 116; *S. C. nom. Hughes* v. *Layton*, 33 L. J. M. C. 89; 10 Jur. N. S. 513; *nom. Hughes* v. *D'Eyncourt*, 3 N. R. 420; 12 W. R. 408.

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a copy of its annual account and statement duly audited (*y*).

Fines and forfeitures.

It is the almost invariable practice of building societies to impose fines or forfeitures upon members who make default in paying their subscriptions at the proper time. There appears to be no limit in the case of an incorporated society to the amount which may be thus charged, but the society must state in its rules what the fines or forfeitures will be (*z*). In the case of an unincorporated society, however, the fines and forfeitures must be "reasonable." As to the meaning of this elastic term and as to fines and forfeitures generally, see *infra*, p. 253 *et seq.*, where the authorities are collected. A useful collection of cases as to fines will be found in the American and English Encyc. of Law, Vol. 4, p. 1042.

Powers of meetings.

The following powers are vested in the meetings of members:—

In the absence of any direction in the rules as to the manner of changing the chief office of the society, it can only be changed by a general meeting specially called for the purpose (*a*).

Where the rules do not provide for the manner of electing arbitrators, they must be elected at the first general meeting of the society, and in the event of the death of any arbitrator, or his refusal or neglect to act, it is for a general meeting to elect another arbitrator in his stead (*b*).

(*y*) Building Societies Act, 1874, s. 40.
(*z*) *Ibid.* s. 16, sub-s. 13.
(*a*) Building Societies Act, 1877, s. 2.
(*b*) Building Societies Act, 1874, s. 34. See as to this, *post*, p. 330.

The yearly account and statement of the society's affairs must be presented at an annual or other general meeting (*c*).

General meeting.

A general meeting can also—

(a) Direct what security other than that of a bond in the statutory form shall be given by any officer having receipt or charge of money, and fix the amount of such security (*d*);

(b) Appoint a person to whom on due demand or notice an officer shall pay over moneys and deliver securities and property of the society remaining in his hands (*e*);

(c) Take proceedings under sect. 31 of the Act of 1874 against any person who fraudulently obtains, withholds or misapplies property of the society (*f*);

(d) Appoint trustees for the purpose of investments in the public funds or upon security of copyhold or customary estate under sect. 25 (*g*);

(e) Make deposits in savings banks up to 300*l*. and invest in Government stock through a savings bank up to 500*l*. (*h*);

(f) Appoint, and require the lord to admit as tenants, not more than three persons to be trustees on behalf of the society of any hereditaments of copyhold or customary tenure to

(*c*) *Ibid.* s. 40.
(*d*) *Ibid.* s. 23.
(*e*) *Ibid.* s. 24.
(*f*) Building Societies Act, 1894, s. 18.
(*g*) Building Societies Act, 1874, s. 25.
(*h*) Building Societies Act, 1894, s. 16.

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which the society is entitled as equitable mortgagee (*i*);

(g) Determine upon the payment to administrators of balances of sale-money, not exceeding 150*l*., due to infant heirs of advanced members (*j*);

(h) Determine upon the purchasing, building, hiring, or taking on lease of a building or land for conducting the society's business, and adapting, furnishing, selling, exchanging, or letting such building (*k*).

Where a certain majority is required.

The following matters can only be transacted by particular majorities of members:—

Three-fourths of the members present at a meeting called for the purpose may pass a resolution for changing the society's name (*l*).

Three-fourths of the members present at a general meeting convened for the purpose may agree on the terms of union with another society, or on the terms of the transfer of the society's engagements to another society, and the agreement will be valid if it obtains the concurrence in writing of the holders of not less than two-thirds of the whole number of shares in the society, whether they are present at the meeting or not (*m*).

In the case of a society certified prior to July 30th, 1874, three-fourths of the members present at a special meeting called for the purpose may alter the rules (*n*).

(*i*) Building Societies Act, 1874, s. 28.
(*j*) *Ibid.* s. 30.
(*k*) *Ibid.* s. 37.
(*l*) *Ibid.* s. 22.
(*m*) *Ibid.* s. 33; Building Societies Act, 1894, s. 19.
(*n*) Building Societies Act, 1874, s. 18. As to the mode of altering the rules in other cases, see *ante*, p. 69.

Where the rules of a society established before August 25th, 1894, provide that advances may be balloted for, a majority of the members present or voting by voting papers at a meeting called for the purpose may resolve upon a scheme for discontinuing advances by ballot, and making other provisions in lieu thereof, but the scheme must be supported by a majority of such of the members present or voting by voting papers at the meeting as have not received their advances by ballot (*o*).

Meetings.

The manner of calling general and special meetings of the members must be specified in the rules of the society (*p*).

Special meeting.

Where the rules required that no action should be brought or defended without the sanction of a majority of members present at "a special meeting," it was held that the sanction of a majority present at a special general meeting was sufficient (*q*). "The meaning of a special meeting is that the meeting shall not be convened unless the parties have notice of the purpose of meeting. A meeting may be both general and special —general for the purpose of doing general business, and special for a particular purpose, then it becomes a special general meeting" (*r*). Where the notice convening a general meeting stated that it would be held for the purpose of receiving the directors' report and the election of directors and auditors, and the directors' report sent therewith mentioned certain special busi-

(*o*) Building Societies Act, 1894, s. 12 (2).
(*p*) Building Societies Act, 1874, s. 16, sub-s. 7.
(*q*) *Cutbill* v. *Kingdom* (1847), 1 Ex. 494; 17 L. J. Ex. 177.
(*r*) *Per* Alderson, B., 1 Ex. p. 504.

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ness not referred to in the notice, namely, the ratification of the board's previous election of A. as a director, it was held that the notice and report together were sufficient notice of this special business (*s*).

General law applies.

In the absence of any special provisions in the rules the ordinary law applicable to meetings of shareholders applies to the meetings of members of a building society. In order that a resolution come to at a meeting may have any legal effect, it is necessary that the meeting shall be duly convened; that a proper number of persons shall be present, and there must always be two at least; that the resolution should relate to a matter upon which the meeting is competent to pass a resolution; and that the resolution should be duly passed. In order that a meeting may be duly convened, it is necessary that it be convened, (1) by those who have a right to convene it, (2) at a proper time, (3) at a proper place, and (4) by a proper notice (*t*). The directors, in the absence of express authority in the rules, have no power to postpone a meeting of the society that has been properly convened (*u*).

Amendments.

An amendment may be moved to a resolution, and

(*s*) *Boschoek Proprietary Co.* v. *Fuke*, [1906] 1 Ch. 148; 75 L. J. Ch. 261; 54 W. R. 359; 94 L. T. 398; 13 Manson, 100; 22 T. L. R. 196.

(*t*) Lindley on the Law of Companies, 6th ed. p. 422; and see also, as to notice of meeting, *Alexander* v. *Simpson* (1889), 43 Ch. D. 139; 59 L. J. Ch. 137; 38 W. R. 161; 61 L. T. 708; 1 Meg. 457; 6 T. L. R. 20, 72; *Tiessen* v. *Henderson*, [1899] 1 Ch. 861; 68 L. J. Ch. 353; 47 W. R. 459; 80 L. T. 483; 6 Manson, 340. Notice need not be served on the representatives of a deceased member unless they have themselves become members: *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656; 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210; 7 Manson, 417; 16 T. L. R. 213.

(*u*) See *Smith* v. *Paringa Mines*, [1906] 2 Ch. 193; 75 L. J. Ch. 702; 94 L. T. 571; 13 Manson, 316.

if it is sufficiently definite the chairman is bound to put it to the meeting (*v*). Whether an amendment must necessarily be seconded does not seem clear, but at any rate no objection can be raised on this ground when once the amendment has been put and voted upon (*w*).

Majority.

In the absence of special provision to the contrary, the resolution come to by the majority of those present is the resolution of the meeting (*x*). It is not competent, however, to the majority at a meeting to come determined to vote in a particular way on any question and to refuse to hear any arguments to the contrary; but when the views of the minority have been heard, the chairman, with the sanction of a vote of the meeting, may declare the discussion closed and put the question to the vote (*y*).

Right of voting.

Whatever provisions the rules contain as to the right of voting must of course be observed. Where the bye-laws of a benefit society provided that "members, to be entitled to vote at the annual elections of officers, must be clear on the books of all constitutional dues and fines at the monthly meeting of December in each year," it was held by the Court of Queen's Bench, Montreal, that members did not lose their votes merely because they had become liable to be fined; it must be shown that the fines had actually been imposed (*z*).

(*v*) *Henderson* v. *Bank of Australasia* (1890), 45 Ch. D. 330; 59 L. J. Ch. 794; 2 Meg. 173, 301; 62 L. T. 869; 63 L. T. 597; 6 T. L. R. 424.

(*w*) *Re Horbury Bridge Coal, Iron, and Waggon Co.* (1879), 11 Ch. D. 109, 117; 48 L. J. Ch. 341; 27 W. R. 433; 40 L. T. 353.

(*x*) *Ibid.*

(*y*) *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469; 67 L. J. Ch. 596; 79 L. T. 249; 14 T. L. R. 496, 547.

(*z*) *Heffernan and Walsh* (1886), Mont. L. R. 2 Q. B. 483.

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Mode of voting.

The regular mode of voting at a meeting is the common law mode, viz., by show of hands, and a rule giving every member one vote for every share only applies to cases where a poll is taken (*a*).

Proxies.

Absent members are not entitled to vote by proxy unless specially empowered so to do by the rules (*b*), and the terms of any provision authorizing such a mode of voting must be strictly complied with (*c*); there is no general common law right to vote by proxy (*d*). On a show of hands a proxy has only one vote, however numerous may be the persons whom he represents, this one vote including his own if a member (*e*). As to the power of a society registered under the Industrial and Provident Societies Act, 1893, which has invested in the shares or on the security of a building society, to appoint a proxy, see sect. 41 of that Act.

Expense of proxies.

Directors, provided they are acting honestly in the interests of the society and not for some private purpose of their own, may lawfully send out proxy papers at the expense of the society (*f*).

(*a*) *Re Horbury Bridge Coal, Iron, and Waggon Co., ubi sup.*

(*b*) The law appears to be different in Scotland: see the observations of the Lord Ordinary (Lord M'Laren) in *Hastie* v. *First Edinburgh and Leith 415th Starr-Bowkett Building Society* (1884), 21 Sc. L. R. 284. The decision in this case was subsequently reversed, but no exception seems to have been taken to his lordship's statement of the general rule of Scotch law on this point.

(*c*) *Harben* v. *Phillips* (1882), 23 Ch. D. 14; 31 W. R. 173; 48 L. T. 334.

(*d*) *McLaren* v. *Thomson,* [1917] 2 Ch. p. 236, *per* Swinfen Eady, L. J.

(*e*) *Ernest* v. *Loma Gold Mines,* [1897] 1 Ch. 1; 66 L. J. Ch. 17; 45 W. R. 86; 75 L. T. 317; overruling *Re Bidwell Brothers,* [1893] 1 Ch. 603; 62 L. J. Ch. 549; 41 W. R. 363; 68 L. T. 342; 3 R. 377.

(*f*) See *Peel* v. *L. & N. W. Ry. Co.,* [1907] 1 Ch. 5; 76 L. J. Ch. 152; 95 L. T. 897; 23 T. L. R. 85; 14 Manson, 30.

Power and duty of chairman.

The chairman of a general meeting has *primâ facie* authority to decide all incidental questions which arise at the meeting and require decision at the time, and the entry by him in the minute book of the result of a poll, or of his decision of any such question, though not conclusive, is *primâ facie* evidence of that result or of the correctness of that decision, and the *onus* of displacing that evidence is thrown on those who impeach the entry (*g*). It is his duty to preserve order, conduct the proceedings regularly, and take care that the sense of the meeting is properly ascertained; but he has no power to stop or adjourn a meeting at his own will, and if he purports to do so it is competent for the meeting to appoint another chairman and proceed with the business (*h*). Where an article of association provided that "the chairman may with the consent of the members present at any meeting adjourn the same," it was held that the chairman was not bound to adjourn a meeting, though a majority of those present desired an adjournment, and that he could, after rejecting a motion for adjournment, declare a provisional agreement specified in the circular convening the meeting to be confirmed (*i*). In a case that came before the registrar it appeared that after directors had been declared elected, some of the members said they 'did not understand what had been done.' The chairman there-

(*g*) *Re Indian Zoedone Co.* (1884), 26 Ch. D. 70; 53 L. J. Ch. 468; 32 W. R. 481; 50 L. T. 547; and see *Wall* v. *London and Northern Assets Corporation,* [1899] 1 Ch. 550; 68 L. J. Ch. 248; 80 L. T. 70; 6 Manson, 312.

(*h*) *National Dwellings Society* v. *Sykes,* [1894] 3 Ch. 159; 63 L. J. Ch. 906; 42 W. R. 696; 8 R. 758; 1 Manson, 457.

(*i*) *Salisbury Gold Mining Co.* v. *Hathorn,* [1897] A. C. 268; 66 L. J. P. C. 62; 45 W. R. 591; 76 L. T. 212; 13 T. L. R. 272.

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upon asked for others to be nominated, and on a vote being taken different persons were elected. The registrar held that the matter was in the discretion of the chairman, and that the second body were duly elected (*j*).

Poll.

The right of a member to demand a poll does not appear to have been decided, but the right would probably be held to exist unless the contrary could be shown (*k*). The demand should be made immediately after the declaration of the show of hands, and if the rules provide that a poll, if demanded, is to be taken "in such manner as the chairman shall direct," he may direct it to be taken then and there, without adjourning the meeting (*l*); *secus*, where the rules provide that the poll shall be taken "at a time and place to be fixed by the directors within seven days from the date of the meeting" (*m*). Where the articles of a company provided that votes should be given either personally or by proxy, and that a poll, if demanded, should be taken "in such manner and at such time and place as the chairman of the meeting directs," Joyce, J., was clear that the chairman could not declare that a poll should be taken by means of voting papers (*n*). A poll is

(*j*) *Buckley* v. *Leeds Perfect Thrift Building Society*, Regr. Rep. for 1898, p. 7.

(*k*) See *Reg.* v. *Wimbledon Local Board* (1882), 8 Q. B. D. 459; 51 L. J. Q. B. 219; 30 W. R. 400; 46 L. T. 47.

(*l*) *R.* v. *D'Oyly* (1840), 12 Ad. & E. 139; *Re Chillington Iron Co.* (1885), 29 Ch. D. 159; 54 L. J. Ch. 624; 33 W. R. 442; 52 L. T. 504; 1 T. L. R. 250.

(*m*) *Re British Flax Producers Co.* (1889), 60 L. T. 215; 5 T. L. R. 197; W. N. 7.

(*n*) *McMillan* v. *Le Roi Mining Co.*, [1905] 1 Ch. 331; 75 L. J. Ch. 174; 54 W. R. 281; 94 L. T. 160; 13 Manson, 65; 22 T. L. R. 186.

merely an enlargement or continuation of the original meeting, and not an adjournment of it (*o*). A proxy, it would seem, cannot demand a poll (*p*).

Adjourned meeting.

An adjourned meeting is in all ordinary cases a mere continuation of the original meeting, and no fresh notice of it need be given (*q*). But no business can be transacted at an adjourned meeting except such as was left unfinished at the original meeting (*r*).

Powers of members.

The following powers are given to members without the necessity of any meeting being held:—

Dissolution.

Three-fourths of the members, holding not less than two-thirds of the whole number of shares, may consent to the dissolution of the society by signing an instrument of dissolution, and may consent to alterations in the instrument in like manner (*s*).

Inspection of books

Ten members, each of whom has been a member of the society for not less than twelve months immediately preceding the date of the application, may apply to the registrar to appoint an accountant or actuary to inspect the books of the society, and to report thereon, and the registrar may make an order accordingly. But

(a) The applicants must deposit with the registrar

(*o*) *Shaw* v. *Tati Concessions*, [1913] 1 Ch. 292; 82 L. J. Ch. 159; 20 Manson, 104; 108 L. T. 487; 29 T. L. R. 261; 57 Sol. J. 322.

(*p*) *R.* v. *Government Stock Investment Co.* (1878), 3 Q. B. D. 442; 47 L. J. Q. B. 478; 39 L. T. 230; *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151; 51 L. J. Ch. 242; 30 W. R. 389; 46 L. T. 322.

(*q*) *Scadding* v. *Lorant* (1851), 3 H. L. C. 418; *Kerr* v. *Wilkie* (1860), 6 Jur. N. S. 383; *McLaren* v. *Thomson*, [1917] 2 Ch. 261; 86 L. J. Ch. 713; 117 L. T. 417; 33 T. L. R. 463; 61 Sol. J. 576.

(*r*) *Reg.* v. *Grimshaw* (1847), 10 Q. B. 747; 16 L. J. Q. B. 385; 11 Jur. 965; 9 L. T. (O. S.) 221.

(*s*) Building Societies Act, 1874, s. 32, sub-s. 3; see *Botten* v. *City and Suburban Permanent Building Society*, [1895] 2 Ch. p. 448, *per* Stirling, J.

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such sum as a security for the costs of the proposed inspection as the registrar may require; and

(b) All expenses of and incidental to the inspection must be defrayed by the applicants, or out of the funds of the society, or by the members or officers, or former members or officers, of the society in such proportions as the registrar may direct (*t*).

The application must be made in the Form N. in the Regulations (*u*).

Powers of inspector.

The person appointed will have power to make copies of any books of the society and to take extracts therefrom at all reasonable hours, at the registered office of the society, or at any place where the books are kept (*v*).

The registrar must communicate the results of any such inspection to the applicants and to the society (*w*).

Application to registrar to appoint inspector or call special meeting.

One-tenth of the whole number of members, or one hundred members in the case of a society consisting of more than one thousand members, may apply to the registrar to do either of the following things, and the registrar, with the consent of the Secretary of State, may make an order accordingly:—

(1) Appoint an inspector to examine into and report on the affairs of the society; or

(2) Call a special meeting of the society (*x*).

Evidence.

The application must be supported by such evidence as the registrar may direct for the purpose of showing

(*t*) Building Societies Act, 1894, s. 4, sub-ss. 1 and 2.
(*u*) Building Society Regulations, 1895, r. 14.
(*v*) Building Societies Act, 1894, s. 4, sub-s. 3.
(*w*) *Ibid.* sub-s. 4.
(*x*) *Ibid.* s. 5, sub-s. 1.

that the applicants have good reason for requiring the inspection to be made or the meeting to be called, and that they are not actuated by malicious motives in their application; and such notice of the application must be given to the society as the registrar may direct (*y*).

Costs.

The registrar must also require the applicants to give security for the costs of the proposed inspection or meeting before the inspector is appointed or the meeting is called; and all expenses of and incidental to the inspection or meeting must be defrayed by the applicants, or out of the funds of the society, or by the members or officers, or former members or officers, of the society, in such proportions as the registrar may direct (*z*).

Powers of inspector.

The inspector may require the production of all or any of the books, accounts, securities, and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer an oath accordingly (*a*).

Meeting.

The registrar may direct at what time and place a special meeting under the above provisions is to be held, and what matters are to be discussed and determined at the meeting, and the meeting will have all the powers of a meeting called according to the rules of the society, and will also in all cases have power to appoint its own chairman, any rule of the society to the contrary notwithstanding (*b*).

Application to

An application under these provisions for the ap-

(*y*) Building Societies Act, 1894, s. 5, sub-s. 2.
(*z*) *Ibid.*
(*a*) *Ibid.* sub-s. 3.
(*b*) *Ibid.* sub-s. 4.

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pointment of an inspector, or for calling a special meeting, must be sent to the registrar, written on foolscap paper, in duplicate, in the Form AL. given in the Regulations, and must be accompanied by a statutory declaration in the Form AM., signed by three at least of the applicants (*c*).

Fee.

A fee of two pounds, which must be sent with the application, is payable for every appointment of inspectors or calling of a special meeting by the registrar (*d*).

Secretary of State.

The registrar may, immediately upon receipt of the application, transmit one copy to the Secretary of State for his consent, or may, before such transmission, give notice of the application to the society, and send to the Secretary of State any answer the society may make (*e*).

Forms.

The appointment of inspectors must be in the Form AN. in the Regulations, or as near thereto as circumstances may allow; the notice of the special meeting, which must be given either by letter addressed to every member or by advertisement, or in such other manner as the registrar directs, must be in the Form AO.; and the chairman of the special meeting must report to the registrar as he may direct in the Form AP. (*f*).

Power for registrar to act without application.

Where evidence is furnished by a statutory declaration of not less than three members of facts which, in the opinion of the registrar, call for investigation,

(*c*) Building Society Regulations, 1895, r. 36.
(*d*) *Ibid.* r. 41, as amended.
(*e*) *Ibid.* r. 37.
(*f*) *Ibid.* rr. 38—40.

or for recourse to the judgment of a meeting of the members, the registrar may exercise the powers given by the above provisions without any application by members, but with the consent of the Secretary of State given on each occasion; but the registrar is bound, on receipt of such declaration, to send a copy thereof to the society, and the society will, within fourteen days from the sending of such copy, be entitled to give him an explanatory statement in writing by way of reply thereto (*g*).

Application to registrar to dissolve society after investigation.

One-tenth of the whole number of members, or one hundred members in the case of a society of more than one thousand members, may make a written application to the registrar setting forth that the society is unable to meet the claims of its members, and that it would be for their benefit that it should be dissolved, and requesting an investigation into the affairs of the society with a view to its dissolution. The registrar may thereupon investigate the affairs of the society, but shall before so doing give not less than two months' previous notice in writing to the society at its chief office or place of meeting (*h*).

Dissolution by registrar.

If on such investigation it appears that the society is unable to meet the claims of its members, and that it would be for their benefit that it should be dissolved, the registrar may, if he considers it expedient so to do, award that the society be dissolved, and shall direct in what manner the affairs of the society are to be wound up. But the registrar may suspend his award for such

(*g*) Building Societies Act, 1894, s. 5, sub-s. 5.
(*h*) *Ibid.* s. 7, sub-s. 1.

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period as he may deem necessary to enable the society to make such alterations of its rules as will in his judgment prevent the necessity of the award being made (*i*).

Notice of dissolution.

The registrar must, within twenty-one days after the making of any award for dissolution under this section, cause notice thereof to be advertised in the Gazette, and in some newspaper circulating in the county in which the registered chief office or place of meeting of the society is situate (*j*).

Forms.

The application to the registrar under the above provisions, the notice by him that he will proceed to investigate the affairs of the society, the award of dissolution, and the advertisement of the award, must all be in the form prescribed by the Regulations (*k*).

Fee.

A fee of three pounds must be sent with the application (*l*).

Shares may be transferred.

In the absence of any provision to the contrary in the rules, it is conceived that shares in a building society are freely transferable by the members, though the point does not seem to have ever been actually decided; but the registrar has held that an infant cannot transfer (*m*). In the case of ordinary joint stock companies it is well settled that where certain definite restrictions are placed on the right to transfer shares, the directors have no implied authority to impose any further restriction (*n*), nor does a right to object to a transferee

(*i*) Building Societies Act, 1894, sub-s. 2.
(*j*) *Ibid.* sub-s. 3.
(*k*) See Building Society Regulations, 1895, Forms W, X, Y and Z.
(*l*) *Ibid.* r. 41, as amended.
(*m*) See *Clifford* v. *Rochester, &c. Society,* cited *ante,* p. 205.
(*n*) Lindley on the Law of Companies, 6th ed. p. 646; *Re Bede*

enable them to object to a transfer to an unobjectionable person, though made for a purpose the directors disapprove (*o*). If, as is often the case, shares are made transferable with the assent of the board of directors, the power of assenting or dissenting to a transfer is reposed in them as trustees, and must not be exercised capriciously, though the directors are not bound to disclose their reasons for rejecting a proposed transferee, provided they have fairly considered the question at a board meeting, and in the absence of evidence to the contrary, the Court will assume that they have acted reasonably and *bonâ fide;* if, however, there is evidence to show that directors who have such a power have exercised it capriciously or unfairly, the Court has jurisdiction to interfere (*p*). A power for directors to refuse to register transfers if "in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof" only justifies a refusal to register upon grounds personal to the proposed transferee (*q*). These principles would seem to apply equally to the case of a building society.

Transfer of shares subject to a charge.

In a case that occurred in Canada the bye-laws of the society provided that no transfer should be made until the transferor had met all his obligations to the society, and that the shares of any member in arrears

Steam Shipping Co., [1917] 1 Ch. 123; 86 L. J. Ch. 65; 115 L. T. 580; 33 T. L. R. 13; 61 Sol. J. 26; *Re Copal Varnish Co.*, [1917] 2 Ch. 349; 117 L. T. 508.

(*o*) *Moffat* v. *Farquhar* (1878), 7 Ch. D. 591; 47 L. J. Ch. 355; 26 W. R. 522; 38 L. T. 18.

(*p*) *Ex parte Penney, Re Gresham Life Assurance Co.* (1872), 8 Ch. 446; 42 L. J. Ch. 183; 21 W. R. 95, 186; 28 L. T. 150; *Re Bell Brothers* (1891), 65 L. T. 245; 7 T. L. R. 689.

(*q*) *Re Bede Steam Shipping Co.*

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to the society should be charged with payment of its claims against him. A., one of the directors, induced the secretary fraudulently to countersign a transfer of his shares to a bank as security for a loan, being at the time in debt to the society. A. subsequently executed an assignment for the benefit of his creditors, when the other directors for the first time became aware of the facts. The society at once paid off the bank and took an assignment of their debt and the shares; and the shares being worth more than the debt the creditors' curator brought an action claiming the shares as part of the insolvent's estate, at the same time making a tender of the amount of the bank's debt. It was held by the Court of Appeal, that the shares must be considered as having always been charged with what the shareholder might owe to the society, and that the creditors had no better right than A. himself at the date of the assignment, viz., to get the shares on payment of what was then due to the society (*r*).

Transfer during winding-up.

As to transfers of shares during a winding-up, see *post*, p. 370.

Forged Transfers Act, 1891.

The Forged Transfers Act, 1891 (*s*), applies to an incorporated building society as if it were a company; see *supra*, p. 99.

Payment of sums not exceeding 50*l*.

If any member of or depositor with a society having in its funds a sum of money not exceeding fifty pounds die intestate, the amount due may be paid to the person who shall appear to the directors or committee of management of the society to be entitled under the

(*r*) *La Société Canadienne-Française de Construction de Montreal* v. *Daveluy* (1891), 20 Sup. Ct. of Canada, 449.

(*s*) 54 & 55 Vict. c. 43, s. 3; amended by 55 & 56 Vict. c. 36.

Statute of Distributions to receive the same, without taking out letters of administration, upon the society receiving (1) satisfactory evidence of death, and (2) a statutory declaration that the member or depositor died intestate, and that the person so claiming is entitled as aforesaid. If the society, after the decease of any member or depositor, has paid any such sum of money to the person who at the time appeared to be entitled to the effects of the deceased under the belief that he had died intestate, the payment will be valid and effectual with respect to any demand from any other person as next of kin or as the lawful representative of such deceased member or depositor against the funds of the society, though such next of kin or representative will have his remedy for the amount of the payment against the person who has received the same (*t*).

Payment to persons appearing to be next of kin declared valid.

It would seem that the power of the board to pay money under the above section is purely discretionary, and that they cannot be compelled by action to exercise their discretion (*u*).

Power is discretionary.

In *Symington's Executors* v. *Galashiels Co-operative Store Co., Limtd.* (*v*), a case decided under the corresponding provisions of the (now repealed) Industrial and Provident Societies Act, 1876, s. 11 (6, 7), as amended by sect. 3 of the Provident Nominations and Small Intestacies Act, 1883, the executor-dative of a deceased member sued the company for the money

Person entitled.

(*t*) Building Societies Act, 1874, s. 29.

(*u*) *Escritt* v. *Todmorden Co-operative Society*, [1896] 1 Q. B. 461; 65 L. J. Q. B. 358; 44 W. R. 544; 74 L. T. 350; decided under a similar provision in the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27.

(*v*) (1894), 21 Rettie, 371; 31 Sc. L. R. 253.

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standing to her credit at her decease. One of the defences was that the company had paid the money to one of the deceased's sons in accordance with directions received from a majority of the next of kin, and that the payment was protected by sect. 11 (7) of the Act of 1876. The Court held that as a majority of the next of kin had no power to dispose of the rights of the minority, the company had not paid the money to a person "entitled by law" (the words of the Act) to receive it, and that the payment was entirely illegal.

Death of advanced member intestate leaving an infant heir.

Whenever a member who has executed a mortgage to the society dies intestate, leaving an infant heir or infant co-heiress, the society, after selling the premises so mortgaged to them, may pay to the administrator or administratrix of the deceased member any money, to the amount of one hundred and fifty pounds, which shall remain in their hands after paying the amount due to them and the costs and expenses of the sale, without being required to pay the same into the Post Office Savings Bank, as provided by the Trustees Relief Act, and the Acts amending or extending the same. Such sum of one hundred and fifty pounds will be considered as personal estate, and liable to duty accordingly (*w*).

This provision, it will be seen, applies only where the four following conditions are fulfilled:—(1) The deceased member must have executed a mortgage to the society; (2) he must have died intestate; (3) his heir must be an infant; (4) the surplus sale moneys must not exceed 150*l*.

(*w*) Building Societies Act, 1874, s. 30.

The Trustees Relief Acts (*x*) are now repealed, and payment into Court is made under sect. 42 of the Trustee Act, 1893 (*y*).

Withdrawal.

It is the right of every investing member of a building society, whether incorporated or unincorporated, to retire from the society and require the return of the amount that he has paid on his shares. This right of "withdrawal," as it is called, is an essential part of his contract, and the rules of every society must set forth the terms on which it may be exercised (*z*). These terms must be *bonâ fide* ones. A rule absolutely forbidding withdrawal will not be registered, nor will a merely colourable provision for the purpose. In terminating societies, however, especially those which lend money without interest, the registrar, it seems, does not object to a rule withholding the right of withdrawal for the first few years of the society's existence; see *ante*, p. 39. Where the rules provided that members wishing to withdraw might receive back their subscriptions on unappropriated shares after the society had been established five years, it was held that a member was entitled to give notice within the five years that he intended to withdraw at the expiration of that period (*a*). Where the date of incorporation was December 6, 1889, and the rules allowed of withdrawals after the society had been "established five years," it

(*x*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

(*y*) 56 & 57 Vict. c. 53.

(*z*) Building Societies Act, 1894, s. 1 (b), (c); in substitution for Building Societies Act, 1874, s. 16, sub-s. 4.

(*a*) *Haworth* v. *Second Collyhurst Model Building Society*, Manchester County Court, Sept. 25th, 1897; and see *Hinton* v. *First Birmingham Perfect Thrift Building Society*, Reg. Rep. for 1894, p. 64.

CHAP. VII. was held that the society did not become 'established' in law until it was incorporated, and that notices of withdrawal given on December 3rd, 4th, 5th and 6th, 1894, were all premature and bad, as the five years did not expire till midnight on the 6th (*b*). So, where a rule allowed withdrawal from the society "five years from its commencement," it was held by the registrar that the society 'commenced' at the date of its incorporation, though it did not begin business till seven months later (*c*). The rules generally require a certain length of notice to be given by a member who desires to withdraw, and it is not unusual to limit in some way the amount that may be withdrawn, *e.g.*, by a rule that "the board may limit the number of withdrawals to be paid off in any one month" (*d*). Unless there is something to the contrary in the rules, the death of a member operates *ipso facto* as an immediate withdrawal from the society (*e*). Where the rules contained the usual provisions as to withdrawal, and a further provision that 'subscriptions in full should be repaid to the personal representatives of deceased members,' it was held by the registrar that such personal representatives must be paid in priority to members who had given notice to withdraw (*f*). In another case that

(*b*) *Pearson* v. *Tyson,* Palatine Ct., Manchester Sittings, 25th April, 1899, Hall, V.-C.

(*c*) *Stroud* v. *Folkestone and District Building Society,* Reg. Rep. for 1902.

(*d*) See *Re Guardian Permanent Benefit Building Society* (1882), 23 Ch. D. p. 463, *per* Jessel, M. R.

(*e*) *Re West London and General Permanent Benefit Building Society* (1898), 78 L. T. 393; 14 T. L. R. 304; 42 Sol. J. 363 (C. A.); *Re Counties Conservative Permanent Benefit Building Society, Davis* v. *Norton,* [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71; see *infra,* p. 403.

(*f*) *Badgery* v. *Penzance Building Society,* Reg. Report for 1906, p. 6.

came before the registrar the rules provided that "on the death of any member the amount due to him shall be paid or transferred to his executors . . . on payment of the usual transfer fee, and they shall have and take as much benefit and advantage, and be subject to and bound by, from and under these rules as the deceased member ought to have or could or might have had or been in case he had been living." On the death of a member his shares had been transferred into the names of his executors and the transfer fees paid. It was held that the executors were entitled to priority of payment, and were not (as the society contended) bound to give notice of withdrawal and await their turn for repayment (*g*).

"Withdrawing."

In some societies the rules speak of a member withdrawing his "contributions" or "shares," which are the expressions used in sect. 1 of the Act of 1894; in others they speak of the withdrawal of the "member" himself, the phrase used in sect. 1 of the Act of 1836; and in others, again, they speak of "withdrawing the amount standing to the credit of the member in the books of the society." There appears to be no real difference in meaning between these expressions; the substance of the thing in every case is that the member may require the return of the money he has paid on his shares and terminate his connection with the society (*h*). It is obvious that the exercise of a right

(*g*) *Re Macdonald and the Municipal Permanent Investment Building Society*, Reg. Rep. for 1909.

(*h*) As to the right of withdrawal in the case of societies registered under the Industrial and Provident Societies Act, 1893, see *Re United Service Share Purchase Society, Ltd.*, [1909] 2 Ch. 526; 78 L. J. Ch. 713; 101 L. T. 273; the right in the case of such a

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of this kind may well give rise to difficult questions, and many such questions have in fact arisen, particularly in the dissolution and winding-up of building societies. These will be discussed in Chapter X., *infra*, p. 404 *et seq.*; here it is proposed to notice only the cases that have been decided as to the position of a withdrawing member when the society is still a going concern and no dissolution or winding-up has supervened.

Withdrawing member who has been repaid.

A member who has given notice of withdrawal and been repaid the amount of his subscriptions ceases to be a member for all purposes, whether the society is incorporated (*i*) or unincorporated (*j*). His connection with the society is entirely at an end, and he is free from all liability, even in the event of a winding-up.

Member whose notice of withdrawal has not expired.

On the other hand, a member who has given notice of withdrawal, but whose notice has not yet expired, still remains a member, and if, while his notice is running, a winding-up order is made, or the society becomes unable to continue its business, the notice is *ipso facto* annulled, and never comes to maturity (*k*).

Member whose notice has expired, but who remains unpaid.

There remains a third case, viz., that of a member whose notice has expired, but who has not yet been paid; and it seems that a person in this position, though he may often be entitled to be paid out of the assets

society differs essentially from the right of withdrawal in the case of a building society.

(*i*) *Re Sheffield and South Yorkshire Building Society* (1889), 22 Q. B. D. 470; 58 L. J. Q. B. 265; 60 L. T. 186; 5 T. L. R. 192; 53 J. P. 375.

(*j*) *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Charnock* (1890), 45 Ch. D. 463; 59 L. J. Ch. 823; 39 W. R. 74; 63 L. T. 483.

(*k*) See as to this, *infra*, p. 412, and the cases there cited.

in priority to other members, and thus be spoken of as a creditor, or *quasi*-creditor, yet remains in effect a member of the society, and must be treated accordingly. "Now, what is the position of a member who has given notice of withdrawal, but who has not been paid back the amount due to him for his subscriptions? Some say he is a member; some say he is a creditor. The true mode of describing him is to describe him as a member who has given notice of withdrawal, and is entitled to payment. That he is not an ordinary creditor is plain. He cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members, he is entitled to be paid the amount due to him before they can divide the assets. In that sense he is a creditor; and that was decided in *In Re Blackburn and District Benefit Building Society* (*l*), which afterwards went to the House of Lords" (*m*).

Withdrawing member is bound by rules and alteration of rules.

Thus, it has been decided that such a member is bound by a rule referring disputes between the society and any member to arbitration (*n*); and his vote must be taken into account in ascertaining the statutory

(*l*) (1883), 24 Ch. D. 421.

(*m*) *Per* Lindley, L. J., in *Sibun* v. *Pearce* (1890), 44 Ch. D. p. 371; 38 W. R. 658; 62 L. T. 388; 63 L. T. 123; 6 T. L. R. 262.

(*n*) *Walker* v. *General Mutual Building Society* (1887), 36 Ch. D. 777; 57 L. T. 574; 3 T. L. R. 847; 52 J. P. 278; *Armitage* v. *Walker* (1855), 2 K. & J. p. 222; 2 Jur. N. S. 13; 26 L. T. (O. S.) 182; 20 J. P. 53; *Huckle* v. *Wilson* (1877), 2 C. P. D. 410; 26 W. R. 98; *Wright* v. *Deeley* (1866), 4 H. & C. 209; 30 J. P. 631; W. N. 74; *Davies* v. *Second Chatham Building Society* (1889), 61 L. T. 680; *Mitchells* v. *Caledonian Building Society* (1886), 13 Rettie, 918; 23 Sc. L. R. 651; *Pendleton* v. *Belfast Model Building Society*, Belfast Recorder's Court, May 16th, 1900; see *infra*, p. 347.

CHAP. VII. majority required to sign an instrument of dissolution under sect. 32 of the Act of 1874, even though the rules provide that a member who has given notice of withdrawal shall 'cease to take part in the affairs of the society' (*o*); and he will also, it seems, be bound by alterations in the rules, though made subsequently to the expiration of his notice of withdrawal and greatly to his prejudice (*p*). Where, however, the rules provided that any person who should give notice to withdraw his invested shares should thereupon cease to be a member of the society (in respect of the shares withdrawn) and forfeit all interest therein, Mr. Justice North, though not actually deciding the point, was inclined to think that a withdrawing member would not be bound (*q*); but where the rules provided that a person who should give notice to withdraw the whole number of his shares should thereupon cease to be a member, and a shareholder gave notice to withdraw some of his shares, then a dispute arose, and then he

(*o*) *Sibun* v. *Pearce* (1890), 44 Ch. D. 354; 38 W. R. 658; 62 L. T. 388; 63 L. T. 123; 6 T. L. R. 262.

(*p*) *Davies* v. *Second Chatham Permanent Benefit Building Society* (1889), 61 L. T. 680; *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; 62 L. J. Ch. 501; 41 W. R. 548; 68 L. T. 846; 3 R. 471; *Barnard* v. *Tomson*, [1894] 1 Ch. 374; 63 L. J. Ch. 488; 8 R. 585; 70 L. T. 306; *R.* v. *Brabrook* (1893), 58 J. P. 117; 10 R. 1; 69 L. T. 718; and see *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656; 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210; 7 Manson, 417; 16 T. L. R. 213. *Cf. British Equitable Assurance Co.* v. *Bailey*, [1906] A. C. 35; 75 L. J. Ch. 73; 94 L. T. 1; 13 Manson, 13; 22 T. L. R. 152, where it was attempted to set up a collateral contract in a prospectus as limiting the power to alter the bye-laws which was given by the deed of settlement.

(*q*) *Christie* v. *Northern Counties Permanent Benefit Building Society* (1889), 43 Ch. D. 62; 59 L. J. Ch. 210; 38 W. R. 280; 61 L. T. 796; and see *Armitage* v. *Walker* (1855), 2 K. & J. p. 222.

gave notice to withdraw the remaining shares, the Court held that he was bound (*r*). It is clear, too, that a person who has given notice of withdrawal if not strictly a member is at least a person claiming on account of a member, and may be bound in that capacity. "I do not think that the plaintiff has ceased to be a member because he has given notice; but if he have, he at any rate is a person claiming on account of a member, because his sole claim is to receive back payments made by himself in the character of member" (*s*).

Liability for further subscriptions.

Whether a member who has given notice to withdraw but has not yet been repaid remains liable for further subscriptions seems to depend on the language of the rules. In *Sibun* v. *Pearce* (*t*), Lindley, L. J., said:—"Now, nothing can be due from him after his notice of withdrawal, whether he has received his money out or not; he has nothing more to contribute." The registrar, however, in a case that came before him took a different view. In that case the rule was as follows:—

"Any person who shall have been a member of the society may withdraw the balance standing to his credit at any time after the expiration of one calendar month after he shall have given notice of his intention to do so, in writing, and left his pass book with the society, and on such withdrawal such person shall cease to be a member of the society in respect of the shares as to which the moneys paid in shall have been withdrawn as aforesaid; but if the money in hand shall, at any

(*r*) *Mackenzie* v. *Everton and West Derby Permanent Benefit Building Society* (1889), 61 L. T. 680.

(*s*) *Per* Fry, L. J., in *Walker* v. *General Mutual Building Society* (1887), 36 Ch. D. p. 786; 57 L. T. 574; 3 T. L. R. 847; 52 J. P. 278; *Mackenzie* v. *Everton, &c. Society*.

(*t*) (1890), 44 Ch. D. p. 372.

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time, be insufficient to pay all the members wishing to withdraw, they shall be paid in rotation according to the priority of their notices."

A member gave notice to withdraw, but the money in hand being insufficient to pay all the members wishing to withdraw, the society contended that he was bound to continue to pay his subscriptions until his turn came for repayment, and was liable to fines in default; and the registrar so held (*u*).

Right of withdrawal cannot be altered by resolution.

The terms on which a member may withdraw being set forth in the rules, the society has no power to vary them except by altering its rules, and any attempt to vary the terms in some other way, as, for instance, by resolution of a general meeting, will be nugatory (*v*).

Order of payment of withdrawing members.

It is very common for the rules to provide that if several members give notice of withdrawal, they shall, if necessary, be paid in rotation according to priority of notice. The effect of such a provision is that, as between two members who give notices at different times, each is, by virtue of his contract with the society, to come in according to the order of date of his notice, and one member will have priority over another according to the dates of their notices, by reason of the common contract which each of them has made with the society on the footing of the rules. A stipulation limiting the right to payment, *e.g.*—a rule that the board shall not be required to pay more than one appli-

(*u*) *Price* v. *Pembrokeshire Permanent Building Society*, Reg. Report for 1912, p. 7; 48 L. J. p. 55.

(*v*) *Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197; 14 Rettie, 27; 24 Sc. L. R. 486; 35 W. R. 632; 56 L. T. 776; 3 T. L. R. 378, reversing the decision below; 12 Rettie, 1320; 22 Sc. L. R. 883.

cant for withdrawal at any one monthly meeting— merely goes to the time at which withdrawing members will actually get paid, and does not affect their right to be repaid, and as between themselves to be paid in order of notice (*w*). As to the construction to be placed upon a rule of this kind in the case of depositors, see *Brett* v. *Monarch Investment Society*, cited *ante*, p. 108.

Repayment of withdrawals.

In one case the rules provided that upon giving one month's notice in writing any member might withdraw his investments at any monthly meeting of the society, the amount to be paid out of the moneys received from members in repayment of advances on the night for withdrawal; but should the repayments not be sufficient the balance should be paid from the same fund on the next or following monthly night, and if several members should give notice to withdraw within any one month they should be paid *pro ratâ*. The plaintiff gave notice on January 20th, which became effective on February 20th, and he contended that his notice, and those of all other persons who gave notices of withdrawal which became effective on or before February 20th, took precedence of the notices of all persons which became effective only on March 20th. On behalf of the society it was contended that all notices, whenever given, which became effective on March 20th took effect *pari passu*. Mr. Justice Stirling was of opinion that the rule in effect created a charge on the moneys received in repayment of advances in favour of withdrawing members. *Primâ facie*, said the

(*w*) *Barnard* v. *Tomson*, [1894] 1 Ch. 374, 383 *seq.*; 63 L. J. Ch. 488; 8 R. 585; 70 L. T. 306; *per* North, J.

CHAP. VII. learned judge, charges on property took effect according to priority of date, and the rule only negatived this presumption of priority so far as regarded members who gave notice to withdraw within any month, but no further; and he accordingly held that persons who gave notice to withdraw within any month took priority over persons who gave notice of withdrawal in subsequent months, and that the contention of the plaintiff was therefore correct (*x*). Where by r. 11 of a society withdrawals were payable only from sums received for repayments made subsequent to the notice of withdrawal on advances by ballot and in the order of notice given, and by r. 18 a member might redeem at any time on paying the full amount repayable on his advanced shares and premium, less five per cent. discount on the amount due at the time of redemption, the registrar held that payments under r. 18 must be included in the repayments under r. 11 out of which withdrawals were to be paid (*y*). Where an advanced member repaid the balance due from him on the terms that it should be re-advanced to him on his giving six months' notice, it was held by the registrar that the money could not be applied in paying withdrawals (to which under the rules repayments subsequent to a notice of withdrawal were applicable) until the conditions under which the society had received the money had been complied with (*z*).

(*x*) *Botten* v. *City and Suburban Permanent Benefit Building Society* (1895), 72 L. T. 87, affd. *ibid.* 375.

(*y*) *Lockey* v. *First Hull Perfect Thrift Building Society*, Reg. Report, 1898, p. 8.

(*z*) *Maywhort* v. *Crewe and District Perfect Thrift Building Society*, Reg. Report for 1900.

Priority of widows and children of deceased members.

The very usual provision that "withdrawing members shall be paid in rotation according to priority of notice, widows and children of deceased members having precedence," means that as between withdrawing members and the widows and children of members who have died without having given notice to withdraw, the latter are to be paid first, and as between themselves according to the dates of the deaths of the deceased members through whom they claim (*a*).

Garnishee orders.

Until a member has given notice of withdrawal the amount due to him in respect of his shares cannot, it seems, be made the subject of garnishee proceedings (*b*).

Sharing losses.

The rules of some societies provide that withdrawing members shall share losses. Where the rules provided that the amount payable on withdrawal should be "subject to any losses sustained by the society," it was held that a withdrawing member was not entitled to receive the full amount standing to his credit as shown by the last preceding statement of accounts, but must be debited with a share of the losses at the date of the notice of withdrawal, and that whatever accounts were necessary for the purpose of ascertaining this amount must be taken (*c*). In a case decided by the registrar, however, where the withdrawing member contended that the loss, if any, must be that shown by the balance-sheet at the end of the financial year in which the

(*a*) *Re West London and General Permanent Benefit Building Society* (1898), (C. A.) 78 L. T. 393; 14 T. L. R. 304; 42 Sol. J. 363; and see *infra*, p. 403. *Barnard* v. *Tomson* seems *contra*, but the point was not actually decided.

(*b*) See *Cowley* v. *Taylor* (1908), 124 L. T. J. p. 569, where the judgment debtor was a member of a friendly society.

(*c*) *The A. B. C. Building Society*, Brighton County Court, December 7th, 1894.

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notice of withdrawal was given, the registrar held that the loss must be ascertained at the time of payment out, not of giving notice (*d*).

Withdrawal of infants.

The question whether an infant member can give an effective notice of withdrawal has not, so far as the writer is aware, ever come before the Courts, though it has more than once been raised before the registrar. In one case it was held that it would, under the circumstances, be for the benefit of the infant to withdraw, and that he was accordingly entitled to do so in pursuance of a notice given by his father and guardian, and that the infant's receipt was a "necessary acquittance" within sect. 38 of the Act of 1874 (*e*); the rules in this case made no provision for infant membership, so that the case depended entirely upon sect. 38 and the general law. In another case the rules provided that "any person under the age of twenty-one years may be admitted as a member, and may give all necessary acquittances." Shortly after the birth of a daughter her parents took up four shares on her behalf and in her name, though they themselves paid the subscriptions of 1*l*. a month. After the death of the father the mother applied to withdraw the shares, which the society refused to allow, but it was arranged that no further subscriptions should be paid. The following year the child (then aged six and a half years) and her mother renewed the application to withdraw, but the society contended they had no power to comply.

(*d*) *King* v. *West Bromwich, Oldbury, and Langley Perfect Thrift Building Society*, Reg. Report for 1898, p. 8.

(*e*) *Cocks* v. *Lombardian Building Society, No.* 11, January 28th and February 2nd, 1887; and see *Clifford* v. *Rochester and District Starr-Bowkett Building Society*, Reg. Report, 1881, p. 39.

The money was required for the child's maintenance and education. It was held by the registrar that the child might withdraw, and that a receipt for the money would be a "necessary acquittance" (*f*).

Assignee.

In *Batchelor* v. *Wigan Economic Building Society* (*g*), a member assigned his property to a trustee for his creditors; there was no provision in the rules that a member who assigned his shares should cease to be a member. The registrar held that the member and his trustee could together give a good notice of withdrawal though under the rules the trustee was not a member.

In *Hodgson* v. *Kent and Surrey Permanent Building Society* (*h*), the plaintiff was the owner of eighty-seven 50*l*. fully paid shares; he was a widower with two children—a son and a married daughter. A solicitor, acting on the instructions of the son, the daughter and her husband, gave notice of withdrawal. He then issued a writ, the plaintiff suing as "a person of weak mind" by a next friend, and moved on behalf of the plaintiff for payment into Court of part of the 4,350*l*. or the appointment of a receiver. North, J., refused the motion.

Withdrawal by director.

Where a director, who was also a shareholder, withdrew his shares having at the time knowledge of the existence of prior notices of withdrawal, and that the liabilities of the society exceeded its assets, it was held in New South Wales that he had committed a breach

(*f*) *Coomer* v. *Newcastle-under-Lyme Benefit Building Society*, Reg. Report for 1908; and see *Jewell* v. *Empire Building Society*, Reg. Report for 1903.
(*g*) Reg. Report, 1898, p. 8.
(*h*) (1888), W. N. 90.

CHAP. VII. of trust for which not only the prior withdrawing members but also the society itself could sue (*i*). But a member who had given notice to withdraw was held by the registrar to be entitled to do so, provided there were sufficient funds for the purpose, although he had been a director and in that capacity had been party to an agreement with the solicitors that the directors would hold them harmless to the extent of the directors' shares in the society (*j*).

As to the position of withdrawing members in the event of a dissolution or winding-up, see Chapter X., p. 404, *infra;* and as to cancellation of a notice to withdraw and interest on the amount withdrawn, see *infra*, pp. 419, 420.

II. *Unincorporated Societies.*

Unincorporated societies.

What has been said above with regard to the members of incorporated societies is true, generally speaking, of the members of unincorporated societies, but subject, of course, to such distinctions as arise from the different statutory provisions applicable in the two cases. The Acts of 1874, 1875, 1877, 1884, and 1894 (with the exception of sect. 40 of the first-named Act), and the Building Society Regulations, have no application to the members of an unincorporated society; their rights are regulated by the provisions of the Act of 1836 (*k*), and the old Friendly Societies Acts of 1829 (*l*) and

(*i*) *Macdougall* v. *Smith* (1898), 19 N. S. W. R. Eq. 168.

(*j*) *Amey* v. *Cornhill Building Society,* January, 1881, cited in Scrat. & Brab. on Building Societies, 2nd ed. p. 46, note.

(*k*) 6 & 7 Will. 4, c. 32.

(*l*) 10 Geo. 4, c. 56.

1834 (*m*) incorporated with it. The effect of these provisions is as follows:—

Value of shares.

The shares must not exceed 150*l*. in value, but there is nothing to prevent persons from subscribing for more than one share (*n*).

Infants.

Whether an infant can be a member of an unincorporated society is doubtful; it depends on whether sect. 32 of the Act of 1829 applies to building societies. If the section does apply, an infant, once admitted with the consent of his parents, masters, or guardians, is apparently in the same position as an adult, except that he probably could not give a mortgage to secure an advance; see *Nottingham Permanent Benefit Building Society* v. *Thurstan*, cited *post*, p. 267.

Married women.

As to married women holding shares in a building society, see *ante*, p. 206.

Joint holders and companies.

As to joint holders of shares, and as to companies becoming members, see *ante*, pp. 208, 209.

Rules bind members and officers.

The rules are binding on the members and officers and their representatives, all of whom will be deemed and taken to have full notice thereof (*o*); and the book in which the rules are entered must be open to the inspection of the members at all reasonable times (*p*).

Fines, penalties and forfeitures.

Reasonable fines, penalties, and forfeitures may be imposed upon members who offend against the rules (*q*); but they must be "reasonable," otherwise they cannot

(*m*) 4 & 5 Will. 4, c. 40.
(*n*) 6 & 7 Will. 4, c. 32, s. 1; *Morrison* v. *Glover* (1849), 4 Ex. 430; 19 L. J. Ex. 20; 14 L. T. (O. S.) 204; 14 J. P. 84.
(*o*) 10 Geo. 4, c. 56, s. 8; see the corresponding provision in the case of incorporated societies, *ante*, p. 218.
(*p*) 10 Geo. 4, c. 56, s. 7.
(*q*) 6 & 7 Will. 4, c. 32, s. 1.

CHAP. VII. be enforced, at any rate in so far as they are intended to secure the due payment of money. "Nothing," said Sir George Jessel, M. R., in *Lovejoy* v. *Mulkern* (*r*), "is better established than this, that in a Court of Equity you cannot enforce a penalty for non-payment of money by a given day. You can obtain interest, but you cannot even obtain increased interest, that being considered a penalty. . . . This Act enables them [benefit building societies] to inflict fines for non-payment of money at a given day, and to enforce the payment of such fines, but subject to this, that they must be reasonable fines. In other words, the rule of equity is broken into only to the extent that the fines are reasonable, and if the fines are not reasonable they are not protected by the provisions of the Act." In that case the plaintiff received an advance of 1,400*l.* in respect of twenty-eight 50*l.* shares which he held in the society, the loan being repayable in five years by sixty monthly instalments of 31*l.* 10*s.* each. He made default in his repayments, and in a redemption action which he subsequently instituted, the question arose as to the amount the society was entitled to claim for fines. The rules contained a table showing the fines payable by advanced members who made default in payment of their monthly instalments for any number of months up to six, and for any number of shares up to ten. Thus, in the case of one share the fine for non-payment of an instalment was, for the first month 6*d.*, for the second month 1*s.*, for the third month 2*s.*, and so on, up to six months. For ten shares

(*r*) (1877), 37 L. T. p. 78; 46 L. J. Ch. 630; W. N. 74, 127.

the fine was in each case ten times the above amount, viz., 5*s*., 10*s*., 1*l*., and so on. But the table went no further, and there was nothing to show what fine (if any) was payable for default in the seventh or any subsequent month, or what was to be paid for any number of shares above ten. Under these circumstances the society contended that they were entitled to charge fines increasing at the above rates on every instalment that fell into arrear, and in respect of each share; and as all the instalments were then overdue, they claimed the sum of 2,936*l*. 5*s*. 11*d*. on this account. The Master of the Rolls held that this was unreasonable, and that according to the true construction of the rules, no fine could be charged for default in payment after the sixth month. At the end of the sixth month, he said, the society were entitled to 6*d*. + 1*s*. + 2*s*., &c., the aggregate amount being 15*s*. 6*d*. per share, and no delay in repayment after the sixth month could entitled them to anything further. Consequently they were entitled to twenty-eight times 15*s*. 6*d*., or 21*l*. 14*s*. in all. On appeal, the Court of Appeal (Lord Coleridge, C. J., James and Baggallay, L. JJ.) held that neither of the above constructions was correct. They agreed with the Master of the Rolls that 5*s*. was the maximum amount that could be charged, but they held that this sum must be paid on every instalment in arrear, and in respect of each share, and they accordingly allowed the society $5 \times 28 \times 60$ shillings, or 420*l*. on account of fines.

In another case (*s*), the rules provided that mort- *Re Tierney's Estate.*

(*s*) *Re Tierney's Estate* (1874), Ir. R. 9 Eq. 1; 8 Ir. L. T. Rep. 29.

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gagors neglecting to make their monthly repayments should be subject to fines at the rate of threepence per share for the first month, and for each and every succeeding month threepence per share additional on such repayments; and that fines in arrear should be subject to fines in the same ratio as repayments in arrear. It was contended that this empowered the society to charge a fine of threepence per share for the first month, sixpence per share for the second month, ninepence per share for the third month, and so on, in arithmetical progression, month after month; but the Court rejected this construction, and held that they could only charge threepence per share for each month, however many months there might be.

"Reasonable fines."

A liberal construction has, however, been placed on the word "reasonable." Thus, a rule imposing fines at the rate of a shilling per pound per month (sixty per cent. per annum), for non-payment of their contributions by advanced members was held to be reasonable (*t*).

Where the rules provided that the fines incurred by all present or future mortgagors by neglecting to make their monthly payments of principal, interest, fines, and other payments should be at the rate of five per cent. per month on the total amount in arrear, it was held that the monthly fine was to be calculated at the rate of five per cent. per month on the amount of the previous fines and other payments, as well as of the principal and interest in arrear, and that the amount of the fine was not unreasonable (*u*).

(*t*) *Parker* v. *Butcher* (1867), 3 Eq. 762; 36 L. J. Ch. 552; *Pilkington* v. *Baker* (2), W. N. (1877) 210.

(*u*) *Re Middlesbrough Building Society* (1884), 54 L. J. Ch.

In *Wilson* v. *Upper Canada Building Society* (*v*), a rule of the society declared that, in case of default in paying subscriptions, the defaulter should pay a fine of threepence per share for the first month, sixpence for the second month, one shilling for the third month, doubling the fine for each succeeding month till the expiration of the first six months; and that after that time, if the same remained unpaid, the share should be forfeited; it was held that no fine was chargeable after the expiration of the first six months.

Where in a bond it was provided that when and so often as the obligor 'should make default in payment of any of the said monthly instalments, he should pay to the said society 1*s*. in the pound for each and every pound of the said instalment so left unpaid,' it was held that the obligees were not entitled to anything in respect of fractional parts of a pound (*w*).

Interest on fines.

In taking the accounts in a foreclosure or redemption action, fines may be treated as principal, and interest charged on them accordingly, if there is an express agreement to that effect (*x*). In the absence of agreement, however, it would seem that fines do not carry interest (*y*).

592; 51 L. T. 743; 1 T. L. R. 46; 49 J. P. 278; W. N. 208; and see also *Ex parte Voisey* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; 31 W. R. 19; 47 L. T. 362.

(*v*) (1866), 12 Grant's Ch. (U. C.) 206.

(*w*) *The Three Towns British Mutual Deposit and Loan Society (Limited)* v. *Doyle* (1862), 13 C. B. N. S. 290; 7 L. T. 276; 1 N. R. 26; 106 E. C. L. 290.

(*x*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; 27 W. R. 110; 38 L. T. 140; and see also *Clarkson* v. *Henderson* (1880), 14 Ch. D. 348.

(*y*) *Parker* v. *Butcher* (1867), 3 Eq. 762; 36 L. J. Ch. 552; *Ingoldby* v. *Riley* (1873), 28 L. T. 55; W. N. 38, both decided by Lord Romilly, M. R.

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Dispensing with fines.

Directors have no power to dispense with a rule imposing fines (*z*), but where the society had not been in the habit of charging the fines, a liquidator was not allowed to open up the accounts of members who had completed or withdrawn their shares prior to the commencement of the winding-up, and levy fines upon them in respect of their arrears (*a*). A total cessation by all members of payment of subscriptions under the erroneous impression that the society was at an end has been held to abrogate a rule as to fines (*b*).

Forfeiture.

The rules not unfrequently provide for the forfeiture of the shares of members who have allowed their subscriptions to fall into arrear. The true construction of such a rule is sometimes a question of difficulty, and the cases on the subject are not easy to reconcile. In *Card* v. *Carr* (*c*), the rules provided that any unadvanced member who should have neglected to pay his monthly subscriptions for six consecutive monthly nights, should thereupon cease to be a member of the society, and forfeit all his interest therein. The Court held that the directors were justified in forfeiting the shares of the plaintiff, who was seven months in arrear with his subscriptions, and that the fact that the two directors in attendance on a subscription night had accepted payment of subscriptions and fines on the

(*z*) *Cotterell* v. *Stratton* (1872), 8 Ch. p. 307; *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. p. 110; 70 L. J. Ch. 66; 49 W. R. Dig. 18; 84 L. T. 146; 17 T. L. R. 44; *Handley* v. *Farmer* (1861), 29 Beav. p. 368; *Wilson* v. *Upper Canada Building Society* (1866), 12 Grant's Ch. (U. C.) 206.

(*a*) *North British Building Society* v. *M'Lellan* (1887), 14 Rettie, 827, 835.

(*b*) *Wilson* v. *Upper Canada Building Society* (1866), 12 Grant's Ch. (U. C.) 206.

(*c*) (1856), 1 C. B. N. S. 197; 26 L. J. C. P. 113.

shares, which the board on subsequently forfeiting the shares had directed to be returned, did not amount to a waiver of the forfeiture. But a member cannot rely on his own default in payment of his subscriptions as an answer to a claim brought against him in respect of them; see *Moore* v. *Rawlins* (*d*), where it was held, under a similar rule, that the neglect of a member to pay his subscriptions and fines only operated as a forfeiture of his shares at the option of the directors.

Automatic forfeiture.

The language of a rule may, however, be such as automatically to effect a forfeiture and determine membership; see *Liquidator of Irvine and Fullarton Property and Investment Building Society* v. *Cuthbertson* (*e*); *No. 7 Boukett Benefit Building Society, Queensland* v. *Warren* (*f*). In the former of these cases, r. 16 was as follows:—

"Every member failing to pay his monthly instalments shall be fined 1*d*. per share for every month such instalments are in arrears, and such fines may be liquidated from the first moneys paid in by the defaulter, or deducted from the amount already paid in by him, and so soon as the fines shall amount to the sum at his credit, the amount thereof shall then be forfeited to the society, and be carried to the contingent fund, and the member shall thereafter cease to have an interest in the society";

and the rule also provided for giving notice to a member that he was in arrear. A question arose in the winding-up of the society whether A. must be placed on the list of contributories. It was admitted that the

(*d*) (1859), 6 C. B. N. S. 289; 28 L. J. C. P. 247; and see *R.* v. *D'Eyncourt* (1864), 4 B. & S. p. 835.
(*e*) (1905), 8 F. 1; 43 Sc. L. R. 17.
(*f*) (1914), St. R. Qd. 125.

CHAP. VII. instalments paid by him on his shares amounted to 10*s*. in all; that if the rule operated automatically this amount would have been extinguished by fines in 1882; and that no notice had ever been given to him that he was in arrear. It was held, affirming the Court below and distinguishing *Moore* v. *Rawlins*, that the rule automatically operated a forfeiture of the shares, and that A. had ceased to be a member in 1882. In the latter case the rule ran thus:—

"If any member make default in payment of his subscription or of an instalment of any advance, whether by way of appropriation or loan, and if default continue for sixteen weeks, he shall cease to be a member, and shall forfeit his shares and all rights and claims of, in, and to the society: Provided always, that if such member satisfy the Board of his inability through illness or want of employment or other sufficient reason to pay up his arrears, the Board may allow his name to stand on the books of the society for a further period up to the time he may agree to pay the said arrears, but if the said arrears be not paid within such extended time he shall forfeit the said shares and all rights and claims of, in and to the society. The rights, powers and remedies of the Board under this rule are in addition to their other rights, powers and remedies under these rules in case of default by a member in payment of subscriptions or instalments of appropriations or loans."

The respondent failed to pay his subscriptions, and after sixteen weeks had elapsed from such failure he claimed that his shares became automatically forfeited, and that he was liable to pay only the amount then in arrear. The society brought an action, claiming subscriptions up to the time when the board passed a resolution forfeiting the shares, which took place some considerable time after the expiration of the sixteen

weeks. It was held by the Supreme Court, affirming the decision below, that the shares were automatically forfeited on default for sixteen weeks.

Death of member.

Where a member's shares fell into arrear after his death intestate, it was held that the society could not declare the shares forfeited in the absence of a legal personal representative (*g*).

Removal of member.

A member removed by resolution of the society under a rule authorizing such removal, subject to tender of the value of his shares, was held by the registrar to be no longer a member (*h*).

No dividend payable until share realized or withdrawn.

No member of an unincorporated society may receive from the funds of the society any interest or dividend by way of annual or other periodical profit upon any shares in the society until the amount or value of his share shall have been realized, except on the withdrawal of the member according to the rules then in force (*i*).

Payment to persons appearing to be entitled.

The payment or division by the trustees, after the death of a member intestate, of any sum of money to or amongst any person or persons who, at the time of such payment, appear to the trustees to be entitled to the effects of the intestate, is valid and effectual as against any other persons claiming as next of kin or lawful representatives of the deceased, so far as the funds of the society and the trustees are concerned, though the remedy of the next of kin or representatives against the person or persons who have received the money remains (*j*).

(*g*) *Glass* v. *Hope* (1869), 16 Grant's Ch. (U. C.) 420.
(*h*) *Creedy* v. *Bentinck Building Society*, March 1881, cited in Scrat. & Brab. on Building Societies, 2nd ed. p. 46, note.
(*i*) 6 & 7 Will. 4, c. 32, s. 1.
(*j*) 10 Geo. 4, c. 56, s. 23.

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Payment of sums not exceeding 20*l.*

Where a member dies entitled to a sum not exceeding 20*l.*, the trustees, if satisfied that no will was made and left by the deceased member, and that no letters of administration or confirmation will be taken out, may pay the same at any time after the death according to the rules of the society, and, in the event of there being no such rules, then may pay and divide the same to and amongst the persons entitled to the effects of the intestate, without letters of administration in England or Ireland, and without confirmation in Scotland (*k*).

Annual account and statement.

Every member of an unincorporated society is entitled to receive from the society a copy of its annual account and statement (*l*).

(*k*) 10 Geo. 4, c. 56, s. 24.
(*l*) Building Societies Act, 1894, s. 25; Building Societies Act, 1874, s. 40; and see also 10 Geo. 4, c. 56, s. 33.

CHAPTER VIII.

MORTGAGES TO BUILDING SOCIETIES.

Nature of mortgages to building societies.

THE principal business of every building society, whether terminating or permanent, is to make advances to its members out of the funds of the society on the security of real or leasehold estate. The form of the mortgage given to secure such an advance depends mainly on the constitution of the society. In the case of a terminating society the object is to secure, not the repayment of the money advanced with interest, but the due payment by the member of his subscriptions and other contributions to the funds of the society until the full amount of the shares of the unadvanced or investing members is realized according to the rules; and as the advanced member receives by anticipation what the investing members will only receive on the termination of the society, he pays from the time he receives his advance an increased or additional subscription, which is called "redemption money," but is in reality interest. The mortgage must therefore be framed in such a way as to secure the due payment by the advanced member of all his contributions until the termination of the society. In permanent societies, on the other hand, a mortgage for an advance to a member is usually in the nature of a security for repayment of the advance by equal instalments, composed of prin-

Terminating societies.

Permanent societies.

cipal and interest combined, and spread over a fixed period (*a*). If the society is incorporated the mortgage is made to the society itself; if it is unincorporated the security must be taken in the names of trustees, and it will vest in the trustees of the society for the time being, without any conveyance or transfer (*b*).

Mortgages of registered land under the Land Transfer Acts.

If the security is to consist of property registered under the Land Transfer Acts, the mortgage will be effected under sect. 9, sub-s. 3, of the Land Transfer Act, 1897 (*c*), which provides that the registered proprietor of land may in the prescribed manner charge it with an annuity or other periodical payment, and the provisions of that Act and of the Land Transfer Act, 1875 (*d*), with regard to charges will apply to any such charge; and provides further that every registered proprietor of land may charge it in favour of a building society, under the Building Societies Acts, by means of a mortgage made in pursuance of or consistent with the rules of the society, and the mortgage will be deemed a charge made in the prescribed manner and will be registered accordingly (*e*).

It was held by North, J., in an unreported case, *Re Planet Building Society* (Land Registry, I., 19 June, 1899), that this sub-section does not authorize the registration of a charge of leaseholds by sub-demise, as these are not charges of "the land" in the sense in

(*a*) See Davidson's Precedents, Vol. II., Pt. 2, p. 704, 4th ed.
(*b*) 10 Geo. 4, c. 56, s. 21; and see *ante*, p. 114.
(*c*) 60 & 61 Vict. c. 65.
(*d*) 38 & 39 Vict. c. 87.
(*e*) In terms the section only applies to incorporated societies, but in practice its provisions would, it is believed, be extended to the case of unincorporated societies.

which that expression is used in the Acts; though, of course, provided that words charging "the land" are inserted there is no objection to the addition of a sub-demise if the parties desire it (*f*).

Power for society to retain original charge and register a copy.

Upon the registration of a charge in favour of a building society, the instrument of charge may (if desired) be delivered to the society after registration upon their delivering at the registry a copy thereof verified by the signature of the secretary as being a correct copy, which copy will be admissible for all purposes as sufficient evidence of the contents and execution of the charge, without the production of the original. The copy need not be stamped, but must be filed in the registry (*g*). Where an instrument of charge is delivered to the society under the foregoing rule it must be endorsed with a certificate of registration, and the instrument so endorsed will be treated for all purposes as the certificate of charge. It must be endorsed with notes of transfers, part discharges and other dealings, and when the charge is wholly discharged must be delivered up, cancelled, and retained in the registry (*h*). The object of these provisions, apparently, is to enable the society to retain the original charge, so that the statutory receipt may be endorsed upon it when the mortgage is paid off; see as to this receipt, *post*, p. 305.

Balloting for advances.

The right to receive an advance from an incorporated society cannot now be made to depend on the result of a ballot, or any chance or lot, except in the case of societies established before August 25th, 1894 (*i*).

(*f*) Brickdale & Sheldon's Land Transfer Acts, 2nd ed. p. 323.
(*g*) Land Transfer Rules, 1903, 1907 and 1908, r. 121.
(*h*) *Ibid.* r. 122.
(*i*) Building Societies Act, 1894, s. 12; see *ante*, p. 64.

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Advances to executors.

An executor may obtain an advance from a building society for purposes of administration, and can give a valid security for money so borrowed, but he is not entitled, on behalf of the estate, to take shares in the society, or to make the estate liable for him as a shareholder. If he undertakes any general liabilities as a shareholder he will be personally liable, but he cannot charge such liabilities on the estate. Accordingly, where an executor executed a mortgage to a society to secure not only money advanced and interest, but also all moneys becoming due from him as a shareholder, it was held that the mortgage was good as against the beneficiaries to the extent of the money advanced and reasonable interest, but not beyond this (*j*).

So, where an executor joined a society and mortgaged leaseholds of his testator to secure an advance, the mortgage deed showing on the face of it that the money was borrowed for executorship purposes, Malins, V.-C., held that there was no objection to the mortgage, except in so far as it purported to be a security not only for repayment of what might become due from the borrower *quâ* executor, but also for any sums which might be due from him individually if he subscribed for other shares in the society; this latter clause his honour considered to be at variance with the rest of the deed, and therefore inoperative (*k*). It is believed to be not unusual for societies to advance money to executors, but they should exercise some caution in doing so.

(*j*) *Thorne* v. *Thorne*, [1893] 3 Ch. 196; 63 L. J. Ch. 38; 42 W. R. 282; 8 R. 282; 69 L. T. 378, Romer, J.

(*k*) *Cruikshank* v. *Duffin* (1872), 13 Eq. 555; 41 L. J. Ch. 317; 20 W. R. 354; 26 L. T. 121; 36 J. P. 708.

An infant member, it has now been decided, cannot execute a mortgage to a building society; see *Nottingham Permanent Benefit Building Society* v. *Thurstan* (*l*). In that case the plaintiff, an infant married woman, obtained advances to enable her to purchase some land and complete certain houses thereon. The transaction was carried out by a conveyance of the land to the plaintiff and a mortgage of it by the plaintiff to the society as security for advances made and to be made to her. The society had no notice of the fact of infancy. The plaintiff on attaining her majority brought an action to set aside the mortgage. Joyce, J., without deciding the general question, held that the purchase and mortgage were really one transaction, and that the plaintiff could not retain the property and repudiate the mortgage. The Court of Appeal varied this decision, and held that, though the society was entitled to an equitable charge on the property for the purchase money which they had paid on behalf of the plaintiff, with interest at 4 per cent., the mortgage was absolutely void under the Infants Relief Act, 1874, and must be delivered up to be cancelled; and the decision of the Court of Appeal was affirmed by the House of Lords.

Security must consist of real or leasehold estate.

The security for an advance must always consist of real or leasehold estate, whether the society is incorporated or not; an advance on the security of a mem-

(*l*) [1903] A. C. 6; 72 L. J. Ch. 134; 51 W. R. 273; 87 L. T. 529; 19 T. L. R. 54; 67 J. P. 129 (D. P.); [1902] 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135 (C. A.). In *Whittingham* v. *Murdy* (1889), 60 L. T. 956, a contract by an infant for the purchase of an allotment from a freehold land society was held not void but voidable and capable of ratification after the infant had attained his majority.

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ber's shares in the society is illegal, and directors who make such an advance will be liable for any loss that may be sustained by the society in consequence (*m*); and though an advance may, without impropriety, be collaterally secured by the personal covenant of the member, or by a charge on property of an unauthorized description, *e.g.*, pure personal estate, the validity of the transaction must be estimated as if no such ingredient entered into it (*n*); as to second mortgages, see *ante*, p. 61. A building society is not justified in lending money on a contributory mortgage (*o*), but there would seem to be no objection in principle to an advance on the security of a sub-mortgage (*p*).

Ordinary law of mortgage applies.

Speaking generally and subject to such variations as necessarily result from the special nature of these securities, the ordinary law of mortgage applies in the case of a mortgage to a building society by one of its members (*q*); there is not one law for building society mortgagees and another for the rest of the King's subjects mortgagees (*r*). At the same time the position of an advanced member of a building society is not

(*m*) *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 39 W. R. 88; 63 L. T. 511; 6 T. L. R. 214, 449; 55 J. P. 148, *ante*, p. 57.

(*n*) *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1889), 44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678; 6 T. L. R. 25, *ante*, p. 58.

(*o*) *Portsea Island Building Society* v. *Barclay*, [1895] 2 Ch. p. 307, *per* Kay, L. J.; 64 L. J. Ch. 579; 72 L. T. 744; 12 R. 324; 11 T. L. R. 424.

(*p*) See *Snethurst* v. *Hastings* (1885), 30 Ch. D. 490; 33 W. R. 496; 52 L. T. 567; 1 T. L. R. 335.

(*q*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; 27 W. R. 110; 38 L. T. 140; *Bell* v. *London and South Western Bank*, W. N. (1874) 10.

(*r*) *Per* Bacon, V.-C., 9 Ch. D. p. 124.

quite the same as that of an ordinary mortgagor, and his rights are affected, to some extent at least, by the contract of membership as well as by the contract of mortgage (*s*); and there are, moreover, certain statutory provisions, such, for instance, as the right to reconvey by endorsed receipt, which have no application to the case of an ordinary mortgage.

Effect of express covenant.

If a member has entered into some express covenant in his mortgage he will not escape liability under it by pleading a provision in the rules to a different effect. Thus, in *Kilsby* v. *Cooper* (*t*), the plaintiff, being entitled to an advance of 300*l.*, found security for only 150*l.* which was advanced to him accordingly, the balance remaining at his call until he should find sufficient security for it. By the mortgage he covenanted to re-pay 7*l.* 10*s.* per quarter, and paid at that rate for some years, though he had not found security for, and consequently had not received, the balance (150*l.*) of his appropriation. He now claimed to pay only 3*l.* 15*s.* per quarter, relying on a rule which provided that an appropriated member should repay at the rate of "ten per cent. per annum on the amount advanced," and filed a bill to restrain the society from proceeding with an action to recover arrears and fines. In the face of the plaintiff's express covenant Sir George Jessel declined to decide upon the construction of the rule in question, and held that in the absence of evidence of

(*s*) *Per* Fry, L. J., *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. p. 380; 37 W. R. 368; 60 L. T. 558; 5 T. L. R. 265.

(*t*) Rolls Court, February, 1874; cited in Serat. & Brab. on Building Societies, 2nd ed. p. 150. *Cf. Inglis* v. *Cave*, cited *infra*, p. 292.

CH. VIII. fraud, surprise or mistake the Court could give no relief; and he dismissed the bill with costs.

Right of member to redeem.

An advanced member of a building society has the right to redeem his security, the terms of redemption depending on the rules of the society and the provisions of the mortgage deed; but questions of great difficulty have sometimes arisen on this point, owing to the want of care shown in framing the rules.

In permanent societies.

In the case of a permanent society it is comparatively easy to ascertain how much must be paid by an advanced member who wishes to redeem his security; but in the case of a terminating society, owing to the impossibility of saying exactly how long the society will last, the calculation is one of some difficulty, and in fact can scarcely be made with perfect theoretical accuracy.

In terminating societies.

The following cases have been decided as to the terms of redemption in terminating societies:—

Seagrave v. *Pope*.

In *Seagrave* v. *Pope* (*u*) the mortgagor claimed to be entitled to redeem on payment of the sums advanced to him by the society less the amount of the subscriptions which he had paid and the proportion of profits in the society to which he was entitled; it was held, however, by the Lord Chancellor, reversing the decision below, that he could only redeem on payment of all sums which, according to the rules, were then due or might thereafter become due during the probable duration of the society; and see *Mosley* v. *Baker* (*v*).

(*u*) (1852), 1 De G. M. & G. 783; 22 L. J. Ch. 258; 16 Jur. 1099; 19 L. T. (O. S.) 173; 20 L. T. (O. S.) 158.

(*v*) (1849), 1 H. & T. 301; 3 De G. M. & G. 1032, n.; 18 L. J. Ch. 457; 13 L. T. (O. S.) 317; affirming *S. C.* below, 6 Ha. 87; 17 L. J. Ch. 257; 12 Jur. 551; 10 L. T. (O. S.) 461;

In *Fleming* v. *Self* (*w*), the decree directed calculation of the longest possible duration of the society at the date of the notice to redeem, having regard to the net assets of the society and to the monthly subscriptions and redemption money still continuing payable, and to the number of shares to be provided for, and charged the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him, assuming the society to last for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members. This decision was followed in *Smith* v. *Pilkington* (*x*), where it was further held that the mortgagor was also entitled to deduct redemption money paid by him, the Court being of opinion that this point had in fact been determined by the Lord Chancellor in *Fleming* v. *Self*, though not expressly referred to in his Lordship's judgment in that case. See also *Archer* v. *Harrison* (*y*), where the trustees, forgetting that advanced members on redeeming would be entitled to participate, had allowed withdrawing members a bonus on too liberal a scale, and the Court declined to relieve the society from the consequences of the mistake.

Fleming v. *Self.*

Smith v. *Pilkington*

Archer v. *Harrison.*

In *Sparrow* v. *Farmer* (*z*), the estimated duration of

Sparrow v. *Farmer.*

Seton, Vol. III., p. 2050, 7th ed., where the form of decree is given.

(*w*) (1854), Kay, 530; 3 De G. M. & G. 997; 24 L. J. Ch. 29; 1 Jur. N. S. 25; 3 W. R. 89; 24 L. T. (O. S.) 101; 18 J. P. 772; 3 Eq. Rep. 14.

(*x*) (1859), 1 De G. F. & J. 120; 29 L. J. Ch. 227; 24 J. P. 227; *S. C.* below, 4 Jur. N. S. 58.

(*y*) (1857), 7 De G. M. & G. 404; 3 Jur. N. S. 194; 29 L. T. (O. S.) 71; 21 J. P. 515.

(*z*) (1859), 26 Beav. 511; 28 L. J. Ch. 537; 5 Jur. N. S. 530; 33 L. T. (O. S.) 216; 23 J. P. 500.

CH. VIII. the society, as shown by a table annexed to the rules, was thirteen years. The manager embezzled the moneys of the society and absconded, whereupon it became evident that the requisite amount (120*l.*) per share would certainly not be realized at the end of thirteen years. One of the rules empowered advanced members to redeem on payment of their subscriptions "up to the end of the thirteenth year of this company;" and the Court held that on payment of this amount an advanced member must be allowed to redeem, although he would remain liable under the rules to pay subscriptions until 120*l.* a share had been realized for the investing members; and see *Farmer* v. *Smith* (*a*), cited *post*, p. 316, *Farmer* v. *Giles* (*b*), and *Handley* v. *Farmer* (*c*). In *Wilson* v. *Upper Canada Building Society* (*d*), however, where the society, if properly managed, should have terminated in ten years, but did not in fact terminate then, it was held that advanced as well as unadvanced members must continue paying their monthly subscriptions, if necessary, until they reached the amount of their shares. So, where the rules provided that the society should terminate when a certain specified sum per share was realized and that members should pay their subscriptions and redemption moneys till the termination of the society, and the termination was delayed by losses beyond the time when it was anticipated it would terminate, the

(*a*) (1859), 4 H. & N. 196; 28 L. J. Ex. 226; 5 Jur. N. S. 533, n.; 7 W. R. 362; 32 L. T. (O. S.) 371; 23 J. P. 230.
(*b*) (1860), 5 H. & N. 753; 30 L. J. Ex. 65; 8 W. R. 649; 2 L. T. 387; 24 J. P. 663.
(*c*) (1861), 29 Beav. 362.
(*d*) (1866), 12 Grant's Ch. (U. C.) 206.

Court was clear that an advanced member must continue his payments, redemption money as well as subscriptions, until the specified amount for each unadvanced share was realized (*e*).

Statute of Limitations.

The right of redemption may, of course, be barred by the Statute of Limitations. Thus, in *Re Metropolis and Counties Permanent Investment Building Society, Gatfield's Case* (*f*), by deed dated 21st May, 1884, leaseholds were mortgaged to secure an advance repayable by instalments extending over ten years, the deed being in the form of a conveyance to the society upon trust to permit the mortgagor to receive the rents until default in payment of any instalment, and then to enter into possession of the rents, keep down the instalments, and pay the balance to the mortgagor, and it also contained a trust for sale. In 1887 the mortgagor made default and the society went into possession and managed the property, treating it in their books as a mortgage transaction, and by 1902 all sums payable under the deed were satisfied. After 1902 the society carried the rents to a "suspense account" till 1910, when the society was ordered to be wound up; and the same year the lease of the property expired. In the winding-up the mortgagor claimed the surplus rents standing to the credit of the suspense account, on the ground that the society were trustees for her, and that the Statute of Limitations did not apply. It was held, by Neville, J., following *Re Alison* (*g*), that

(*e*) *Stevens* v. *Wellington and Hull Building Society* (1885), 4 N. Z. L. R. 241.
(*f*) [1911] 1 Ch. 698; 80 L. J. Ch. 387; 104 L. T. 382.
(*g*) (1879), 11 Ch. D. 284; see *infra*, p. 295.

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the deed though in form a trust was in substance a mortgage, that the statute began to run (*h*) in 1887 when the society took possession, and that the mortgagor's claim was consequently barred. It was further held, following on this point the decision of Walton, J., in *Wilson* v. *Walton and Kirkdale Permanent Building Society* (*i*), that the annual statutory accounts published by the society, in which the leaseholds were included among the properties of which the society were in possession as mortgagees, were not 'acknowledgments' of the mortgagor's title within sect. 7 of the Real Property Limitation Act, 1874 (*j*).

Whether societies entitled to future interest.

A question has sometimes arisen whether the society on a sale or redemption is entitled to the full amount of the future instalments, including such part as consists of interest and premium (if any), or whether so much as consists of future interest or premium ought not to be deducted, or at least some rebate or discount allowed for present payment. The answer seems to depend on the rules of the society and the terms of the mortgage; the decisions on the point, which are not easy to reconcile, are as follows:—

Future interest allowed.

Matterson v. *Elderfield*.

In *Matterson* v. *Elderfield* (*k*) the mortgage contained a power of sale in the event of the subscriptions

(*h*) In *Wilson's Case* (1903), 19 T. L. R. 408, Walton, J., seems to have been of a different opinion as to the time when the statute begins to run.

(*i*) (1903), 19 T. L. R. 408.

(*j*) 37 & 38 Vict. c. 57.

(*k*) (1869), 4 Ch. 207; 17 W. R. 422; 20 L. T. 503; 33 J. P. 326; see *Neath Building Society* v. *Luce* (1889), 43 Ch. D. p. 163. Where a bill of sale was given to secure repayment of a principal sum and interest by instalments, the trustee in bankruptcy of the grantor was not allowed to redeem except on payment of the full amount of the future instalments: *Re Davies, Ex parte Equitable Investment Co.* (1897), 4 Manson, 358; 77 L. T. 567.

(which were composed partly of principal and partly of interest) falling into arrear, and the purchase-money was to be applied in satisfaction of all moneys then due or thereafter to become due from the mortgagor in respect of subscriptions, fines, insurance, or otherwise under the mortgage deed, and the surplus was to be paid to the mortgagor. The subscriptions fell into arrear, and the directors sold the property. Lord Hatherley, L. C., held, reversing the decision of Giffard, V.-C., that the society was entitled to take at once the whole amount of the future subscriptions without allowing any discount or rebate whatever, although the rules directed that such an allowance should be made in the case of a mortgagor redeeming his mortgage before the expiration of the full period of payment, and he was of opinion that there was no substantial difference in a question of this kind between a permanent and a terminating society. CH. VIII.

Re O'Donohoe's Estate.

In *Re O'Donohoe's Estate* (*l*), a member in May, 1873, obtained as "advanced shares" a loan of 3,000*l*., repayable "by way of annuity," in thirteen years, by 156 monthly subscriptions or instalments of 30*l*. each, together with certain fines in default of punctual payment. The rules provided that a member might redeem by paying all subscriptions, fines, and other moneys which might be then in arrear, as well as the present value of all future payments to be computed at the rate of 5 per cent. on all annuities having not more

(*l*) (1876), Ir. R. 10 Eq. 221; and see *Western Canada Loan and Savings Society* v. *Hodges* (1875), 22 Grant's Ch. (U. C.) 566; *Crone* v. *Crone* (1879), 26 *ib.* 459.

CH. VIII. than five years unexpired of the original term, and at the rate of 6 per cent. when there should be more than ten and not more than fifteen years unexpired. The mortgage provided that if the borrower should be two months in arrear, the trustees of the society might sell the mortgaged premises, and after paying all expenses, should retain in trust for the society all repayments, fines, and other payments and sums then due to the society in respect of the shares, and the then present value of the future repayments to be made in respect of the shares to the society, calculated to the end of the term for which the shares had been advanced, and which future repayments should be discounted after the rate of 5 per cent. per annum interest on such repayments upon the principle of repayments made at the end of each year. The mortgaged premises were subsequently sold in the Landed Estates Court on the petition of a *puisne* incumbrancer, the mortgagor being over two months in arrear at the date of the filing of the petition, and in July, 1875, on the settlement of the final schedule, the society claimed, besides twenty-three months' instalments, which were then in arrear, and the fines upon them, "the present value of future payments at 6 per cent. discount as per rule." The Court of Appeal in Ireland held, discharging the order of the Court below, that the society was entitled, in addition to arrears and fines, to the value, at the date of payment, of the future repayments in respect of the mortgage, calculated from such date to the end of the term for which the mortgage was originally taken, subject to a rebate or discount at the rate of 5 per cent. per annum.

Future interest not allowed. *Ex parte Osborne.*

In the case of *Ex parte Osborne, In re Goldsmith* (*m*), however, in which *Matterson* v. *Elderfield* was not cited, it was held that future interest ought not to be allowed. In that case the mortgage contained a power of sale in case of default in payment of subscriptions, and it was declared that the trustees should retain out of the purchase-money all such subscriptions, fines, and other sums of money and payments which should be then due, or which should afterwards become due in respect of the said shares during the remainder of the said period of seven years, it being agreed that in case of any such sale all the moneys which would at any time afterwards become due from the mortgagor in respect of the said shares, according to the rules of the association, should be considered as then immediately due and payable; and the rules provided that a borrowing member might at any period redeem his property on equitable terms. The mortgagor, after paying a few subscriptions became bankrupt, and the trustees of the society sold the property under the power of sale. The Court of Appeal (Lord Cairns, L. C., James and Mellish, L. JJ.) held that the society were entitled to retain out of the proceeds of sale all subscriptions and fines payable up to the time of the completion of the sale, and such further sum as represented the balance of the principal sum remaining at that time unpaid, but that they were not entitled to any payment in respect of interest accruing after the principal had been all repaid. In the course of his judgment Lord Cairns

(*m*) (1874), 10 Ch. 41; 31 L. T. 366; and see *West* v. *Diprose*, [1900] 1 Ch. 337; 69 L. J. Ch. 169; 48 W. R. 389; 82 L. T. 20; 64 J. P. 281; 7 Manson, 152.

CH. VIII. said:—"Interest implies forbearance, and therefore when the whole is paid there can be no interest. That seems the natural result of the transaction, and the trust of the sale moneys in the mortgage deed is consistent with that view. It is there provided that the trustees, after payment of the expenses of the sale, shall 'retain all such subscriptions, fines, and other sums of money and payments which shall be then due or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years, it being agreed by the said parties hereto that in case any such sale shall take place all the moneys which would at any time afterwards become due from the said G. Goldsmith, his executors, administrators, or assigns, in respect of the said shares, according to the rules of the said association, shall be considered as being immediately due and payable.' With regard to the future, you cannot include under 'moneys which would at any time afterwards become due' any fines; no more can you include payments in respect of interest, for interest can only arise in respect of a principal sum remaining outstanding and forborne. Therefore my conclusion is, that everything due in respect of monthly instalments and fines at the time of the sale must be retained; and then it must be ascertained how much of the monthly payments represented principal, and how much interest, and it will then appear how much of the principal remained unpaid. That must also be retained, and that will conclude the transaction."

Contract for future interest not illegal.

The mere fact that a contract provides for the payment of interest after the principal sum has been repaid

does not, it seems, make it illegal. In *Noakes* v. *Rice* (*n*), indeed, Lord Davey said:—"I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption." But in a subsequent case (*o*) Lord Parker of Waddington dissented from this view. His Lordship said:—"Nor can I accept the proposition that upon the occasion of a loan a mortgagee cannot stipulate for any payment falling due after the principal is repaid. Such a rule would seriously interfere with business transactions, and would be a hardship on mortgagees and mortgagors alike. Take, for instance, a case like *Potter* v. *Edwards* (*p*), where in consideration of 700*l.* a mortgagor agrees to pay 1,000*l.* with interest on a fixed date, and the proviso for redemption is framed accordingly. This is good, but according to the proposition in question if the mortgagor had desired further time for the payment of the 300*l.* bonus, and the proviso for reconveyance had been upon payment of the 700*l.* and interest on the fixed date, and the 300*l.* by instalments payable later, there would have been an illegal clog. I can see no objection to a bargain by which money is advanced for three years

(*n*) [1902] A. C. p. 34; 71 L. J. Ch. 139; 50 W. R. 305; 88 L. T. 62; 66 J. P. 147; 18 T. L. R. 196.
(*o*) *Kreglinger* v. *New Patagonia Meat Co.*, [1914] A. C. p. 58; 83 L. J. Ch. 79; 109 L. T. 802; 30 T. L. R. 114; 58 Sol. J. 97.
(*p*) (1857), 26 L. J. Ch. 468; 5 W. R. 407; 112 R. R. 418.

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and the borrower pays by way of remuneration or interest for the use of money a further sum payable by instalments extending over five years. Why should there be any principle of law or equity precluding free contract in this respect?" The result appears to be that what the society is entitled to retain in these cases is a mere question of the construction of the particular contract, and that no question of legality or illegality arises.

Premium.

In *Harvey* v. *Municipal Permanent Investment Building Society* (*q*), it was held by Pollock, B., on the construction of the rules and the mortgage deed, that a premium of 2*s*. per share per annum, payable by advanced members, must be added to the capital sum advanced, and interest charged on the combined amount, and that the borrower was not entitled on redeeming to any rebate in respect of the premiums contracted to be paid.

Redemption on such terms as the board think reasonable.

In a case that occurred in New South Wales the rules provided that if a mortgagor wished to redeem before the time limited for that purpose the board might allow him to do so upon such terms as they might think reasonable. The mortgagor made default in payment of his instalments, and the society in exercise of the powers contained in the mortgage took possession of the mortgaged premises, but did not exercise their power of sale. The Court held that the mortgagor was not entitled to redeem without the permission of the board before the time fixed by the mortgage, but that on payment of what was then presently due to the

(*q*) (1883), 26 Ch. D. 273; 52 L. J. Ch. 349.

society he was entitled to recover possession, and directed an account to be taken accordingly (*r*).

Provision for immediate payment of future instalments on default.

A provision making all future instalments immediately payable in case default is made in regular payment will amount to a personal covenant to that effect on the part of the borrower; see *Sherriff* v. *Glenton* (*s*). In that case the mortgage contained a provision that on non-payment of three successive instalments the mortgaged premises might be sold, and on any sale all the future instalments "should be held immediately payable and be retainable accordingly from the proceeds of sale," subject to such discount as the directors might think fit to allow; and the deed also contained a covenant by the member to pay the instalments. The payments having fallen into arrear, the directors exercised their power of sale, and then brought an action against the member to recover the difference between the proceeds of sale, which were insufficient to satisfy their claim, and the unpaid instalments. The Court of Queen's Bench (*t*) were clear that the above words implied a personal covenant by the member that upon non-payment of three instalments he would at once pay the whole sum remaining due, subject only to such discount as the directors might think proper to allow.

Balance payable on default.

A provision making the balance of instalments payable on default in payment of one instalment is not a penalty, and there is no objection to it in point of law (*u*); nor is such a provision affected by the society

(*r*) *O'Reilly* v. *Heydon* (1893), 14 N. S. W. R. Eq. 283.
(*s*) (1873), 28 L. T. 65.
(*t*) Blackburn, Lush and Archibald, JJ.
(*u*) *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 29 W. R. 81; 43 L. T. 258; *Sterne* v. *Beck*

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being wound up (*v*); nor is the provision waived by accepting payment of an instalment after default (*w*). A provision for "punctual payment" in a mortgage means payment on the day fixed for payment, and payment nine days after such fixed day is not good payment (*x*); but to pay "duly" does not necessarily mean "punctually," and in such a case payment a few days late will be sufficient (*y*).

Power of sale.

Under the Conveyancing Act, 1881, s. 20, the statutory power of sale is exerciseable if and when some interest is in arrear and unpaid for two months after it has become due; this includes an instalment expressed to be for principal and interest combined (*z*). It is no objection to a power of sale that it is made exerciseable without notice to the mortgagor, and the society will not be restrained from exercising it (*a*).

Set-off.

If a member holds both advanced and unadvanced shares, but the society is insolvent and is being wound up, he cannot on redemption set off the amount stand-

(1863), 1 De G. J. & S. 595; 32 L. J. Ch. 682; 11 W. R. 587, 791; 8 L. T. 344, 588; 2 N. R. 12, 346; *Protector Endowment Loan and Annuity Co.* v. *Grice* (1880), 5 Q. B. D. 592; 49 L. J. Q. B. 812; 43 L. T. 564, reversing the decision below; 5 Q. B. D. 121; 49 L. J. Q. B. 247; 42 L. T. 183.

(*v*) *Cordingley* v. *Alliance Society* (1887), W. N. 220.

(*w*) *Keene* v. *Biscoe* (1878), 8 Ch. D. 201; 47 L. J. Ch. 644; 26 W. R. 552; 38 L. T. 286; *Ex parte Burden* (1881), 16 Ch. D. 675; 29 W. R. 879; 44 L. T. 525.

(*x*) *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, [1898] 1 Ch. 343; 67 L. J. Ch. 135; 46 W. R. 230; 77 L. T. 665; 14 T. L. R. 117, 157.

(*y*) *Benabo* v. *James* (1900), 109 L. T. J. 408; *Starkey* v. *Barton*, [1909] 1 Ch. 284; 78 L. J. Ch. 129; 100 L. T. 42.

(*z*) *Walsh* v. *Derrick* (1903), T. L. R. 209; 47 Sol. J. 247, C. A. *Cf. Re Thompson and Holt* (1890), 44 Ch. D. 492; 59 L. J. Ch. 651; 38 W. R. 524; 62 L. T. 651.

(*a*) *Bazenal* v. *Liberator Building Society* (1878), C. A., cited in Scrat. & Brab. on Building Societies, 2nd ed. p. 185.

ing to his credit against the amount due from him on the advanced shares (*b*).

Suspension of repayments.

Where an advanced member had been allowed by the directors, in accordance with a provision for that purpose in the rules, to suspend his repayments for twelve months, it was held by the registrar that the society could not at the end of the period of suspension require payment of the suspended instalments as if they were in arrear, but that the effect of the suspension was to postpone the payment of the instalments for twelve months after the original due dates (*c*).

When the mortgagor is bankrupt.

If the mortgagor becomes bankrupt and the society is compelled to prove in the bankruptcy, other considerations arise. Under these circumstances the old rule was that there could be no proof for interest accruing due after the date of the adjudication, the theory in bankruptcy being to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time (*d*).

Ex parte Bath.

This rule was applied in the case of *Ex parte Bath*. There a member of a building society borrowed 1,200*l*., for which he was to pay 144*l*. premium and interest at 5 per cent. per annum on 1,344*l*. The principal, premium, and interest were made payable in a fixed number of monthly instalments, each of which consisted of principal, premium, and interest. The mortgagor filed a liquidation petition, and the society claimed to prove in the liquidation for the total amount

(*b*) *Davis* v. *Mutual Society, Somerset,* Reg. Report, 1906.
(*c*) *Davis* v. *Second Criterion Mutual Benefit Building Society,* Reg. Report, 1908.
(*d*) *Per* James, L. J., *Re Savin* (1872), 7 Ch. p. 764; 20 W. R. 1027.

CH. VIII. of the monthly instalments which remained due under the deed, less the amount at which they valued their security. The Court of Appeal held—(1) That no proof could be made in respect of so much of the sum claimed as represented interest payable subsequently

Premium. to the filing of the petition (*e*); but (2) That the premium was not in the nature of interest, and that the society were entitled to prove for it in the liquidation (*f*). In the course of his judgment, Lindley, L. J., said:—"On looking at the mortgage deed and considering the mode of working these societies, I am quite satisfied that this premium has nothing whatever to do with interest. It is a sum which is not altogether arbitrary, because it is calculated with reference to the duration of the loan. The object is to fix a sum which it will be worth the borrower's while to pay for the accommodation granted him by the society, that accommodation being the payment of the principal and interest by instalments. It is not a cloak for getting compound interest, or anything of that kind; it is a charge made for the convenience granted to the borrower. There is nothing illegal in it, nothing uncommon, nothing oppressive, and it appears to me that it would be an entire mistake to call it interest in any sense or shape. If you look at the deed it is quite plain it is not treated as interest, because the deed draws a distinction between the actual sum advanced, the 1,200*l.*, the premium, and the interest. The advance and the premium are first capitalised, and interest

(*e*) *Ex parte Bath, Re Phillips* (1882), 22 Ch. D. 450; 31 W. R. 281; 48 L. T. 293.
(*f*) *S. C.* (1884), 27 Ch. D. 509; 32 W. R. 808.

is charged on the aggregate sum; and then there is the clause which provides for the application of the instalments. But we must look at the substance of the thing, and I am satisfied that the premium is not in the nature of interest."

Present rule in bankruptcy.

Under the Bankruptcy Act, 1914 (*g*), however, the rule as to future interest is somewhat different, and the effect of that Act and Rule 22 in the Second Schedule thereto is that where a debt is by contract payable at a future date with interest in the meantime, and the debtor becomes bankrupt before the time of payment has arrived, the creditor may prove for interest after the date of the receiving order. In such a case, the proper course is first to prove the principal sum as a present debt, deducting a rebate of interest at 5 per cent. from the dividends upon it under Rule 22; and then to value the liability to pay interest, and prove for that value, the dividend on which will be paid without any rebate. If the rate of interest contracted for is 5 per cent. then, as under the rule interest is to be calcultead at 5 per cent. for the purposes of rebate, the proper course is simply to prove for the principal sum as a present debt without any rebate (*h*).

Bankruptcy petition.

A bankruptcy petition may be presented against an advanced member, signed by the secretary of the society if duly authorized in that behalf; such a petition falls within sect. 149 of the Bankruptcy Act, 1914, and not within Rule 277 (*i*).

(*g*) 4 & 5 Geo. 5, c. 59.

(*h*) *Re Browne and Wingrove, Ex parte Ador,* [1891] 2 Q. B. 574; 61 L. J. Q. B. 15; 40 W. R. 71; 65 L. T. 485; 7 T. L. R. 747.

(*i*) *Re Tovey* (1910), 26 T. L. R. 456; *Re A Debtor* (*No.* 28 *of* 1917), [1917] 2 K. B. 808; 117 L. T. 574.

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Payment to administrator on death of advanced member leaving an infant heir.

If an advanced member of an incorporated society die intestate leaving an infant heir, the society, after selling the mortgaged premises, may pay to the administrator of the deceased member any money to the amount of 150*l.* which remains in their hands after paying the amount due to the society and the costs of the sale, and such sum of 150*l.* will be considered as personal estate and be liable to duty accordingly (*j*). In ordinary cases, surplus sale moneys for which the society cannot obtain a discharge should either be paid into Court under the Trustee Act, 1893, or else set apart and invested, and if this is not done the society will be liable to be charged with interest at 4 per cent. from the time of the completion of the sale (*k*). Except as to the balance of the purchase money, however, the society in exercising a power of sale in a mortgage is not a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale (*l*).

Whether society may transfer the security.

It has been held in Ireland that a building society has the ordinary right of a mortgagee to transfer the security; see *Ulster Building Society* v. *Glenton* (*m*), where, however, the learned judge who decided the case seems to have treated the mortgagor as consenting even if he did not bring the assignment about, and, of course, if the mortgagor consents there is no difficulty (*n*). Such a transfer, however, unless made with the assent

(*j*) Building Societies Act, 1874, s. 30, *ante*, p. 238.
(*k*) *Charles* v. *Jones* (1887), 35 Ch. D. 544; 56 L. J. Ch. 745; 35 W. R. 645; 65 L. T. 848.
(*l*) *Warner* v. *Jacob* (1882), 20 Ch. D. 220; 51 L. J. Ch. 642; 30 W. R. 731; 46 L. T. 656.
(*m*) (1888), 21 L. R. Ir. 124.
(*n*) *Re Rumney and Smith,* [1897] 2 Ch. p. 359, *per* Lindley, L. J.

of the mortgagor, appears to be of doubtful validity, and in any case it seems clear that difficulties might often arise in the exercise, by a private transferee, of such rights and powers as are usually vested in a building society under its mortgages. In a case that came before the Court of Appeal a member mortgaged property to the trustees of a building society, and the mortgage empowered "the trustees or trustee for the time being of the society" to sell the property in case of default. The mortgage was transferred to a person not a member of the society, who put it up for sale, purporting to act under the power. It was held that, assuming the transfer to be valid—as to which the Court gave no opinion—the power could not be exercised by any one except the trustees or trustee for the time being, and that the vendor could not make a good title (*o*).

Transfer by advanced member.

The effect of a transfer by an advanced member of his shares and the equity of redemption in the mortgaged premises must depend in each case upon the rules of the society and the terms of the transfer, but as a general rule the result would probably be to release the transferor and substitute the transferee in his stead as the person liable to the society (*p*).

Advanced members bound by alteration of rules.

An advanced member will be bound by any alteration of the rules that may be made subsequently to the date of his advance, even though the result may be to

(*o*) *Re Rumney and Smith*, [1897] 2 Ch. 351; 66 L. J. Ch. 641; 45 W. R. 678; 76 L. T. 800; 13 T. L. R. 479; affg. 66 L. J. Ch. 482; 76 L. T. 343; *Bradford* v. *Belfield* (1828), 2 Sim. 264.

(*p*) *Ingledew* v. *Temple* (1881), 70 L. T. Journ. 263; *Municipal Building Society* v. *Curtis*, Nov. 1881, Q. B. D., Stephen, J., cited in Scrat. & Brab. on Building Societies, 2nd ed. p. 203.

CH. VIII. increase the burden upon him; for his rights must necessarily be affected more or less by the contract of membership as well as by the contract of mortgage, and the contract of membership carries *in gremio* the right on the part of the society to alter the rules from time to time (*q*). "Alterations may vary the sum which he has to pay, and they may possibly vary his obligations in other respects, as to the time of payment, and so forth; but so long as they are consistent with his contract, and also consistent with the constitution of the society, it seems to me that a member of a building society must be just as much bound by a later rule whether he is or is not an advanced member" (*r*).

Wilson v. *Miles Platting Society.*

The decisions on this question are as follows:—In *Wilson* v. *Miles Platting Building Society* (*s*), by the rules as they stood at the date of the mortgage, advanced members were not bound to contribute to losses, but the mortgage contained a covenant by the borrower to pay to the society "all subscriptions and contributions, interest, fines, premiums of insurance, and other moneys, and to do and perform all acts and things which, according to the rules for the time being (*t*) of the society and the provisions herein con-

(*q*) *Per* Fry, L. J., *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. p. 380; 37 W. R. 368; 60 L. T. 558; 5 T. L. R. 265; and see the judgment of Cotton, L. J., in *Wilson* v. *Miles Platting Society* (1889), 22 Q. B. D. p. 382, n.

(*r*) *Per* Kekewich, J., *Bradbury* v. *Wild*, [1893] 1 Ch. p. 390.

(*s*) (1889), 22 Q. B. D. 381, n. For Canadian cases see *Williams* v. *The Dominion Permanent Loan Co.* (1901), 1 Ont. L. R. 532, distinguished in *Lee* v. *Canadian Mutual Loan and Investment Co.* (1903), 5 Ont. L. R. 471.

(*t*) As to the meaning of the expression "for the time being," see the judgment of Lord Westbury, L. C., in *Ellison* v. *Thomas*

tained, shall from time to time become due and payable, and which ought to be done and performed by the mortgagor;" and the proviso for redemption was expressed in similar terms. By an alteration of rule made subsequently to the mortgage, the directors were empowered to charge a member paying off any shares in respect of which an advance had been made with such a sum in respect of such shares as would *pro ratâ* with the other subscriptions and paid-up shares in the society, in the opinion of the board, be sufficient to cover any loss or anticipated loss of the society. The Court of Appeal held that the mortgage was subject to the altered rule, and that the borrower could only redeem on that footing.

Rosenberg v. Northumberland Building Society.

In *Rosenberg* v. *Northumberland Building Society* (*u*), the Court of Appeal held that they were bound by the decision in *Wilson* v. *Miles Platting Building Society*, which was practically undistinguishable, and they followed it accordingly.

Bradbury v. Wild.

In *Bradbury* v. *Wild* (*v*), the mortgage was redeemable on payment of "the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments, which, under the constitution of the said society, and the rules and regulations thereof," ought to be paid in respect of the mortgagor's shares, and there was a covenant for payment to the same effect. The rules were afterwards altered by empowering the

(1862), 1 De G. J. & Sm. p. 26; 32 L. J. Ch. 32; 11 W. R. 56; 7 L. T. 342; 8 Jur. N. S. 1139; 1 N. R. 37.

(*u*) (1889), 22 Q. B. D. 373; 37 W. R. 368; 60 L. T. 558; 5 T. L. R. 265.

(*v*) [1893] 1 Ch. 377; 62 L. J. Ch. 503; 41 W. R. 361; 68 L. T. 50; 57 J. P. 68; 3 R. 195.

CH. VIII. directors to make a levy on members by way of contribution to losses, and it was held that, although the mortgage made no reference to the rules "for the time being," yet the mortgagor was bound by the alteration, his contract being one of mortgage and membership combined, and that he could not redeem except on payment of his proportion of the levy.

Smith's Case.

On the other hand, in *Smith's Case* (*w*), where an advanced member had covenanted to pay to the society "at the times and in manner prescribed by its rules for the time being applicable thereto respectively, the several sums of money payable periodically by way of subscription or otherwise" in respect of his shares, and that in the meantime (except where varied by those presents) all the rules "for the time being" of the society should in respect of the said shares be observed by him, and the society seven years afterwards adopted new rules, one of which provided that advanced members should before redeeming their securities pay an additional sum as a contribution towards certain losses sustained by the society, and another of which provided that, so far as the rules of law and equity would permit, the rules then passed should apply to all the members as well present as future and to all its transactions as well past as future, Hall, V.-C., was clearly of opinion that members who received their advances before the date of the new rules were not bound by them, and were entitled to redeem on payment only of those sums which they were liable to pay according to the rules in existence at the date of the advance. Cotton, L. J., in

(*w*) (1875), 1 Ch. D. 481; 45 L. J. Ch. 143; 24 W. R. 103.

giving judgment in *Wilson* v. *Miles Platting Building Society,* distinguished *Smith's Case* on the ground that the covenant there only contemplated that the time and manner of payment might be varied, and that the alteration was only to take effect "so far as the rules of law and equity would permit." As the covenant and the rule were framed in that case, the learned Lord Justice thought the decision of Hall, V.-C., was right, but, he added, if the Vice-Chancellor had meant to say that in the case of a security containing a covenant by the mortgagor to pay everything which the rules of the society for the time being might require to be paid, new rules made after the date of the security would not apply, he should differ from his view and could not follow it. *Smith's Case* may therefore be considered of somewhat doubtful authority, and it will probably not be followed in future.

Advanced members not liable for losses.

In the absence of special contract, however, an advanced member of a permanent society is not liable, even in a winding-up, to bear a share of losses sustained by the society; see *infra,* Chap. X., p. 388, and the authorities there cited. There is no substantial difference in this respect between incorporated and unincorporated societies.

Mortgage to secure subscriptions "and other moneys."

In a mortgage to secure the repayment of principal money by certain instalments with interest, and subscriptions, "and other moneys," these last words must be construed to mean moneys *ejusdem generis* with those previously mentioned, and will not include moneys of the society which the member who was also

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the secretary had received in the latter character, and subsequently misapplied (*x*).

Set-off of money paid before mortgage executed.

In *Inglis* v. *Cave* (*y*) the plaintiff applied for a loan of 250*l*. Notice having been given by the society that the money would be ready at the end of three months from the notice, the plaintiff, in accordance with the rules, paid twelve shillings a week until a satisfactory security should be provided, making altogether 16*l*. 4*s*., when a mortgage was executed for 220*l*. The rules provided that a sum amounting to 10 per cent. on the money advanced should be paid by quarterly instalments from the date of the mortgage. It was held by Malins, V.-C., that the 16*l*. 4*s*. must be set off against the earliest instalments.

Interest.

A rule that a member, to whom an advance has been granted, shall pay interest until the advance has been received by him, ceases to operate when the society ceases to be a going concern (*z*).

Consolidation.

Where the mortgagor had covenanted to observe all the rules of the society, and one of such rules provided that if the society held more than one mortgage from any member he should not have power to redeem one property alone without the consent of the board, it was held that the effect of the covenant was the same as if the words of the rule were repeated in the mortgage, and that the society had a right to consolidate as against a subsequent incumbrancer with notice of the covenant,

(*x*) *Bailes* v. *Sunderland Equitable Industrial Society, Limited* (1886), 55 L. T. 808; 3 T. L. R. 97; 51 J. P. 310; W. N. 191; 31 Sol. J. 77.

(*y*) (1869), W. N. 131. *Cf. Kilsby* v. *Cooper*, cited *ante*, p. 269.

(*z*) *North British Building Society* v. *M'Clellan* (1887), 14 Rettie, 827; *S. C., nom. Selkirk* v. *Taylor*, 24 Sc. L. R. 600.

though in the absence of such notice there would, under the circumstances, have been no right of consolidation (*a*).

In *Hughes* v. *Britannia Permanent Benefit Building Society* (*b*), a mortgage to the society of property X. contained a provision that the mortgagor should not redeem without paying all moneys that might be secured to the society by any other mortgage. The mortgagor then mortgaged property Y. to the society, and next day made a second mortgage of it to the plaintiffs, of which mortgage the society had notice, and subsequently made two further mortgages of other properties to the society. The plaintiffs brought an action as second mortgagees to redeem Y. It was held that the society could consolidate their mortgage on X. with their mortgage on Y., but not the two subsequent mortgages.

Where subscriptions continued after advance.

If the rules provide that a member who has obtained an advance may continue to pay his subscriptions in addition to making his repayments under the mortgage, the result will be to give the society a claim on any subscriptions so paid as an additional security for the advance. This was the ground of the decision in *Moxon* v. *Berkeley Mutual Benefit Building Society* (*c*), though the question actually determined was as to a right of marshalling. In that case a member obtained an appropriation of 500*l.* in respect of certain shares and gave a mortgage to secure the advance in

(*a*) *Andrews* v. *City Permanent Building Society* (1881), 44 L. T. 641.
(*b*) [1906] 2 Ch. 607; 75 L. J. Ch. 739; 95 L. T. 327.
(*c*) (1890), 59 L. J. Ch. 524; 62 L. T. 250.

Ch. VIII. the usual way. The rules gave him an option to continue his subscriptions while repaying his appropriation, and also provided that he should be entitled to have his subscriptions placed to his credit in respect of his repayments under the mortgage; but he made no request to this effect, and it was not done, nor did the rules in terms give the society any corresponding right. For some time he continued to pay both his subscriptions and repayments, but ultimately ceased to pay either and filed a liquidation petition. The society then sold the mortgaged property under their power of sale for 1,300*l.*, which satisfied the amount due under the mortgage and left a balance of 500*l.*; and they had also in their hands a sum of 336*l.*, being the amount of the subscriptions paid in by the member after the date of his appropriation. The question as to how this sum should be dealt with arose between a mortgagee of the equity of redemption and the purchaser under the liquidation of all the debtor's property except that comprised in the mortgage. Mr. Justice Kay held that, either by contract or by the operation of the law of set-off, the society had a right not only against the mortgaged property, but also against the 336*l.*, and that neither the mortgagor nor anyone claiming under him could insist on having that fund paid over till the mortgage debt was satisfied. The society, said the learned judge, had an estate and a fund to which they might resort for payment of the debt due to them from the member. The member afterwards assigned the estate to one person and the fund to another; that brought the case within the ordinary rule as to marshalling, and the equity between the two assigns was to have the debt

paid rateably out of the two funds. For another case on the construction of rules directing the subscriptions of an advanced member to be placed to the credit of his repayment account, see *Weekes* v. *South London Equitable Building Society* (*d*). CH. VIII.

Death of advanced member.

On the death of an advanced member his legal personal representative is the only person who can give a good discharge to the society for the amount of the subscriptions standing to the credit of the deceased, whatever claims the fund may be liable to when once it has reached the hands of such personal representative (*e*).

Foreclosure.

A building society may obtain a judgment for foreclosure against an advanced member, and the form of decree does not differ materially from that in the case of an ordinary mortgage (*f*). In a case that came before Chitty, J., the judgment directed an account of what was due to the plaintiffs under or by virtue of their security, regard being had to the redemption tables of the society, and for the costs of the action, and, in default of payment, foreclosure (*g*).

Mortgage in form of trust for sale.

Where the mortgage is in the form of a trust for sale to secure the moneys due to the society, a decree for sale, and not foreclosure, is the proper remedy (*h*). "I

(*d*) (1896), 13 T. L. R. 94, 291.
(*e*) *Re Burton, Scott* v. *Hackney* 172*nd Starr-Bowkett Building Society* (1897), 13 T. L. R. 275.
(*f*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; 27 W. R. 110; 38 L. T. 140; *Ingoldby* v. *Riley* (1873), 28 L. T. 55; W. N. 38; *Bell* v. *London and South Western Bank* (1874), W. N. 10; Building Societies Act, 1874, s. 13.
(*g*) *Boney* v. *Charter* (1887), W. N. 52.
(*h*) *Schweitzer* v. *Mayhew* (1862), 31 Beav. 37; and see *Jenkin* v. *Row* (1851), 5 De G. & S. 107; 16 Jur. 1131.

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see no difference," said Wood, V.-C., "between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of a mortgagee" (*i*).

Security by registered charge under the Land Transfer Act, 1875.

If the society is the registered proprietor of a registered charge under the Land Transfer Act, 1875, it may enforce a foreclosure or sale of the land charged in the same manner and under the same circumstances in and under which it might enforce the same if the land had been transferred to the society by way of mortgage, subject to a proviso for redemption on payment of the money at the appointed time (*j*); and, if the registered proprietor of a registered charge with a power of sale, it may, at any time after the expiration of the appointed time, sell and transfer the land charged or any part thereof, in the same manner as if it were the registered proprietor of the land (*k*).

County Court.

If the mortgage was given to secure more than 500*l*., but less than that amount is due when the action is commenced, the County Court has jurisdiction (*l*).

(*i*) *Kirkwood* v. *Thompson* (1865), 2 H. & M. 392, 402; and see *Locking* v. *Parker* (1872), 8 Ch. App. 30; 42 L. J. Ch. 257; 21 W. R. 113; 27 L. T. 635; *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284; 27 W. R. 389, 537; 40 L. T. 234; *Re Metropolis and Counties Building Society*, cited *ante*, p. 273.

(*j*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 26.

(*k*) *Ibid.* s. 27.

(*l*) *Shields, Whitby and District Amalgamated Model Building*

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Copyholds.

As to the appointment of trustees for the purpose of being admitted to copyholds of which the society is equitable mortgage, see *ante*, p. 86.

Costs of action for redemption or foreclosure.

A building society is entitled, like any other mortgagee, to its costs of an action for redemption or foreclosure unless its conduct has been vexatious and oppressive. Such costs are not in the ordinary discretion of the Court, like the costs of litigation generally. The society, being a mortgagee, has an absolute right to costs, which will not be interfered with except for actual misconduct; see *Cotterell* v. *Stratton* (*m*). In that case the directors of a building society, in answer to one of their advanced members, stated that 736*l*. was due on the mortgage, the society having been for some years in possession. Soon afterwards they informed the member that they intended to sell the property under the power of sale, upon which he filed a bill to restrain the sale and for redemption. The directors then said they had no intention of pressing a sale, and by consent a decree was taken for the usual accounts. On the accounts the mortgagor attempted, but unsuccessfully, to surcharge the society to the amount of 1,227*l*., principally for fines and commis-

Society v. *Richards* (1901), 84 L. T. 587; 45 Sol. J. 537; W. N. 106. In the report in the Weekly Notes the amount 475*l*. appears to be a clerical error for 575*l*.

(*m*) (1872), 8 Ch. 295; 42 L. J. Ch. 417; 21 W. R. 234; 28 L. T. 218; 37 J. P. 4; and see also *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. at p. 278; 58 L. J. P. C. 82; 38 W. R. 465; 60 L. T. 467; 7 T. L. R. 342, *per* Lord Macnaghten. For an instance in which the costs of a counterclaim and an appeal were thrown on the society, see *Durham and Northumberland Working Men's Permanent Building Society* v. *Davidson*, cited *post*, p. 395, where the society had refused to allow the defendant to redeem except on terms which were wholly inconsistent with any fair construction of the rules.

CH. VIII. sion; the society were, however, charged with certain occupation rents, and were disallowed charges for repairs, so that the amount due at the filing of the bill was found to be 517*l.* instead of 736*l.* The Court of Appeal held, reversing the decision of Malins, V.-C., that there was nothing in the conduct of the society which would deprive them of the right to add their costs of the suit to their security; and further, that in such a case an appeal as to costs might be maintained, and that the costs of the appeal might be included in the costs of the suit. In the course of his judgment the Lord Chancellor (Lord Selborne) said:—"The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established and does not rest upon the exercise of that discretion of the Court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner, the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate their proper costs incident to the execution of the trust. These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or

culpable neglect of his duty under the contract. Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions and the safety of trustees. In fact, such a departure, instead of being beneficial to those who may have occasion to borrow money on security, or to repose confidence as to property in their friends or neighbours, would, in the result, throw the former class of persons into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions, and would deprive the latter class of the assistance of all who cannot afford, or are not inclined, to bestow upon the affairs of other persons their money as well as their trouble and time." See further as to the costs of mortgagees, *Turner* v. *Hancock* (*n*), where the above language of Lord Selborne is quoted with approval by Jessel, M. R.; *Charles* v. *Jones* (*o*); *Kinnaird* v. *Trollope*(*p*); Morgan and Wurtzburg on Costs, pp. 221 *et seq.*; and R. S. C. 1883, Order 65, r. 1. And though a mortgagee who has been deprived of his costs may appeal, yet if, notwithstanding charges of misconduct, the judge has allowed the mortgagee his costs, the mortgagor cannot appeal; for the fact of the misconduct, if proved, would only have the effect of bringing the costs within the discretion of the judge, and

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(*n*) (1882), 20 Ch. D. 303; 51 L. J. Ch. 517; 30 W. R. 480; 46 L. T. 750.

(*o*) (1886), 33 Ch. D. 80; 56 L. J. Ch. 161; 35 W. R. 88; 55 L. T. 331.

(*p*) (1889), 42 Ch. D. 610; 58 L. J. Ch. 556; 60 L. T. 892; 5 T. L. R. 513.

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consequently within the rule that there is no appeal for costs which are within the discretion of a judge (*q*).

Interest on fines.

In taking the accounts in a foreclosure or redemption action, fines will be treated as principal and will carry interest accordingly, if there is an agreement to that effect; see the cases cited *ante*, p. 257.

Payment of instalments by tender for life.

If the tenant for life of property which is in mortgage to a building society pays the instalments as they fall due, he will be entitled to a charge on the inheritance for so much of the amount paid as represents principal (*r*).

Director appointed receiver.

Where the society appointed one of its directors receiver of the rents of the mortgaged premises, it was held by the Court of Appeal in Ireland that he could not, on taking the accounts, be allowed any commission out of the rents (*s*), but this decision seems contrary to principle, and has been disapproved by the Court of Appeal in England (*t*).

Land acquired by foreclosure must be sold.

Any land to which an incorporated society may become absolutely entitled by foreclosure, or by surrender, or by other extinguishment of the right of redemption, must be sold or converted into money as soon afterwards as conveniently practicable (*u*). There

(*q*) *Charles* v. *Jones*, *ubi sup.*, explained in *Re Beddoe, Downes* v. *Cottam*, [1893] 1 Ch. 547; 62 L. J. Ch. 233; 41 W. R. 177; 68 L. T. 595; 2 R. 223.

(*r*) *Re Alexander*, May 29th, 1908 (C. A.), unreported; *Re Harvey, Harvey* v. *Hobday*, [1896] 1 Ch. 137; 65 L. J. Ch. 370; 44 W. R. 242; 73 L. T. 613.

(*s*) *Kavanagh* v. *Working Man's Benefit Building Society*, [1896] 1 I. R. 56.

(*t*) See *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618; 80 L. J. Ch. 426; 104 L. T. 867; 18 Mans. 258; 27 T. L. R. 393; 55 Sol. J. 482, Cozens-Hardy, M. R., and Buckley, L. J., Fletcher Moulton, L. J., diss.

(*u*) Building Societies Act, 1874, s. 13.

is no such provision in the case of an unincorporated society.

Purchase by agent of society.

If the mortgaged property is sold by the society under a power of sale, no solicitor or other agent who acts for the society in the matter of the sale can buy it; see *Martinson* v. *Clowes* (*v*), where a purchase by the secretary of the society was set aside, though he had bought at an auction and there was no proof of undervalue. So, in *Hodson* v. *Deans* (*w*), a sale at an auction by a friendly society to a member of the committee which was managing the sale, was set aside.

Settlement of disputes.

A dispute between the society and a member who has executed a mortgage to secure an advance is not generally a matter to be settled by arbitration; it must be decided by the Courts in the ordinary way, unless, in the case of an incorporated society, the rules contain an express provision to the contrary; see *post*, pp. 325 and 343.

Stamp duty on mortgages.

Mortgages to an incorporated building society are liable to stamp duty in the ordinary way (*x*); if the society is unincorporated, any mortgage to the society by a member for a sum not exceeding five hundred pounds is exempt from duty (*y*).

Duty, how ascertained.

A mortgage to secure the repayment of an advance by mixed instalments of principal and interest will be chargeable with duty on the amount of the advance (*z*);

(*v*) (1882), 21 Ch. D. 857; 51 L. J. Ch. 594; 30 W. R. 795; 46 L. T. 882; on appeal, 52 L. T. 706; W. N. (1885) 41.

(*w*) [1903] 2 Ch. 647; 72 L. J. Ch. 751; 89 L. T. 92; 19 T. L. R. 596.

(*x*) Building Societies Act, 1874, s. 41.

(*y*) 10 Geo. 4, c. 56, s. 37; Stamp Act, 1891, s. 89; and see *ante*, pp. 94, 125.

(*z*) Stamp Act, 1891, s. 87, sub-s. 2; *Mersey Docks and Har-*

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but if it be to secure future subscriptions, it appears that it is considered to be chargeable with duty on the whole amount secured; how the duty is to be assessed when the period during which the subscriptions are to continue is uncertain is not apparent (*a*).

Deduction for income-tax.

A member of a building society, who has executed a mortgage to the society in the usual form to secure an advance, is entitled to deduct income-tax on so much of each periodical instalment as is in fact payment of interest (*b*); but not on such portion as is repayment of principal, this not being income at all, but capital (*c*). The right to deduct income-tax from time to time as and when mortgage interest is paid is absolute, and a mortgagor so deducting income-tax is acquitted and discharged by statute of so much money as the deduction shall amount to as if the amount had actually been paid to the person to whom the interest was due and payable, and if the society should refuse to allow the deduction it will become liable to a penalty of 50*l.* (*d*). The tax should be deducted from each instalment before it is paid, and where this was not done it was held that the amount could not afterwards be deducted from the future instalments (*e*).

bour Board v. *Commissioners of Inland Revenue*, [1897] 1 Q. B. 786; [1897] 2 Q. B. 316; 66 L. J. Q. B. 697; 45 W. R. 448; 77 L. T. 120; 61 J. P. 693; 13 T. L. R. 338, 515.

(*a*) See Dav. Prec. vol. II. Part 2, p. 709, 4th ed.

(*b*) *Re Middlesbrough, &c. Building Society, Ex parte Wythes* (1885), 53 L. T. 492; *Mosse* v. *Salt* (1863), 32 Beav. 269; 32 L. J. Ch. 756; *Crane* v. *Kilpin* (1868), 6 Eq. 334; 37 L. J. Ch. 913; 18 L. T. 350; *Raffles* v. *Gateshead Conservative Building Society* (1889), 86 L. T. J. p. 410.

(*c*) *Foley* v. *Fletcher* (1858), 3 H. & N. 769; 28 L. J. Ex. 100; 22 J. P. 819.

(*d*) Income Tax Act, 1918 (8 & 9 Geo. 5), c. 40, First Schedule, General Rules applicable to all Schedules, rr. 19, 23.

(*e*) *Re Middlesbrough, &c. Building Society, Ex parte Wythes*

Premium.

A premium charged for an advance has been held not to be in the nature of interest, although made payable by instalments (*f*).

Arrangements offered by the Board of Inland Revenue as to income-tax in the case of building societies.

This right of the advanced members to deduct income-tax leads in practice to considerable difficulty, the members being in many cases persons whose incomes would entitle them to exemption. With a view to meeting this difficulty, and also that arising from the liability of the society to pay income-tax under Schedule D, the Board of Inland Revenue has sanctioned two alternative schemes of arrangement, either of which may be adopted by a building society, provided its directors are willing to accept in their entirety the conditions therein laid down; see *ante*, p. 97.

Provision in rules for custody of mortgage deeds.

The rules of building societies often provide that all mortgage deeds and securities belonging to the society shall be deposited in a box with different keys held by different persons, and that the box shall be kept at the society's bankers for safe custody. In one case (*g*), where the rules contained a provision to this effect, the solicitor of the society, who was entitled in fee simple to a house under a conveyance dated January 30th, 1880, mortgaged the house to the society by a deed dated February 11th, 1890. The rule requiring the deeds to be deposited at the bank was found so inconvenient that it had become the practice not to deposit

(1885), 53 L. T. 492; *Galashiels Provident Building Society* v. *Newlands* (1893), 20 Rettie, 821; 30 Sc. L. R. 730; W. N. (1896) 107. But see *Agnew* v. *Ferguson* (1903), 5 Fraser, 879; 40 Sc. L. R. 636; Income Tax Act, 1918, s. 211 (2).

(*f*) *Ex parte Bath, Re Phillips* (1884), 27 Ch. D. 509; 32 W. R. 808, cited *ante*, p. 283.

(*g*) *Garside* v. *Liverpool Railway Permanent Benefit Building Society* (1897), 13 T. L. R. 189.

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the deeds on each occasion, but to wait until there were several mortgages, and the mortgage deed in the present case was accordingly left in the custody of the solicitor until November, 1890, when he handed it to the society, together with a forged instrument purporting to be the conveyance of January 30th, 1880. In the meantime, however—viz., on July 25th, 1890—the solicitor had mortgaged the house to the plaintiff, to whom he handed the genuine conveyance of January 30th, 1880. The question arose, which of the two mortgagees was entitled to priority. The Court of Appeal held that the case was governed by *Northern Counties of England Fire Insurance Co.* v. *Whipp*(*h*); that, beyond the lax practice of the society as to depositing the deeds at the bank, which the Court considered was the natural result of having too strict a rule, there was nothing whatever to justify the inference that the directors were either directly or indirectly assisting to defraud the plaintiff or had been guilty of anything even approaching to *mala fides;* and that under these circumstances the society, as legal mortgagee, was entitled to priority.

Loss of deeds.

Where mortgage deeds were lost by the solicitor the society recovered judgment against him for the value of the mortgaged property, reducible to 1*s.* on the deeds being handed over (*i*).

Discharge of mortgages to a building society.

On payment of all moneys due under the security, an advanced member will be entitled to a reconveyance

(*h*) (1884), 26 Ch. D. 482; 53 L. J. Ch. 629; 32 W. R. 626; 51 L. T. 806.

(*i*) 15*th Starr-Bowkett Building Society* v. *Medcalf*, cited *ante*, p. 188.

of his property, discharged from all further claims. This is effected in the case of an incorporated society under the 42nd section of the Act of 1874, which provides as follows:— CH. VIII.

"When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or resurrender whatever; and if the said mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, the registrar under such Act, or his deputy or assistant registrar, or the recording officer, as the case may be, or, in the case of copyholds or lands of customary tenure, if the mortgage or further charge has been entered on any court rolls, the steward of the manor or his deputy respectively shall, on production of such receipt, verified by oath of any person, make an entry opposite the entry of the charge or mortgage, to the effect that such charge or mortgage is satisfied, and shall grant a certificate, either on the said mortgage or charge or separately, to the like effect, which certificate shall be

Receipt endorsed on mortgage to be sufficient discharge without reconveyance.

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Form of receipt.

The following is the form of receipt given in the Schedule to the Act:—

> THE Building Society hereby acknowledge to have received all moneys intended to be secured by the within [*or* above] written deed.
>
> In witness whereof the seal of the society is hereto affixed this day of by order of the board of directors [*or* committee of management] in presence of secretary [*or* manager].
>
> [*Other witnesses, if any required by the rules of the society.*]

This form, it must be observed, is fixed by the statute, and cannot be modified by the society's rules, as in similar cases under the Friendly Societies Act and the Industrial and Provident Societies Act. It must therefore be strictly followed, though possibly a mere clerical error might not be fatal to its due operation (*k*).

Secretary or manager.

In a case that came before the registrar the society

(*j*) Building Societies Act, 1874, s. 42.

(*k*) See *Spice* v. *Bacon* (1877), 2 Ex. D. 463, 466; 46 L. J. Ex. 713; 25 W. R. 840; 36 L. T. 896.

had both a secretary and a manager. Rule 8 provided that every document to which the seal was affixed should be signed by the secretary *or* manager, and rule 74 provided that on the repayment of an advance "the usual statutory vacating receipt" should be placed upon the mortgage deed; and a form of receipt was appended to the rules, though not referred to in them, which ended with the words "in the presence of ——— secretary," omitting the words "or manager" contained in the statutory form. It was contended that a receipt sealed and signed by the manager was not sufficient to revest the estate in the mortgagor, and that where there was a secretary he alone could sign. The registrar held that there was nothing in the Act which confined the efficiency of the manager's signature to cases where there was no secretary, and that the mere circumstance of a form being appended which did not indicate a manager's signature was not sufficient to limit the operation of rules 8 and 74, and that the signature of the manager was therefore sufficient (*l*). CH. VIII.

Receipt is an "assurance."

A receipt under the Building Societies Acts is an "assurance" within the meaning of the Yorkshire Registries Act, 1884 (*m*).

Stamp duty.

The receipt appears to be in all cases exempt from stamp duty, whether the society is incorporated (*n*) or unincorporated (*o*). A reconveyance by an incorporated society is likewise exempt, and the right to

(*l*) *Blades* v. *Leek United Permanent Building Society*, Feb. 8th, 1887.

(*m*) 47 & 48 Vict. c. 54, s. 3.

(*n*) Building Societies Act, 1874, s. 41; *Old Battersea and District Building Society* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 294, cited *ante*, p. 95.

(*o*) 10 Geo. 4, c. 56, s. 37, *ante*, p. 124.

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exemption will not be lost by reason of the trustees under an instrument of dissolution concurring in the deed (*p*).

Two modes of discharging mortgage.

Section 42, it will be noticed, prescribes two methods by which, on the discharge of a mortgage to an incorporated society in England or Ireland, the property comprised in the security may again become vested in the mortgagor or those claiming under him—(1) a reconveyance; (2) a statutory receipt. In the case of an unincorporated society, the corresponding section of the Act of 1836 merely authorizes the giving of a receipt, the section being in the following terms:—

6 & 7 Will. 4, c. 32, s. 5.

"It shall be lawful for the trustees named in any mortgage made on behalf of such societies, or the survivor or survivors of them, or for the trustees for the time being, to endorse upon any mortgage or further charge given by any member of such society to the trustees thereof for moneys advanced by such society to any member thereof, a receipt for all moneys intended to be secured by such mortgage or further charge, which shall be sufficient to vacate the same, and vest the estate of and in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged; which receipt shall be specified in a schedule to be annexed to the rules of such society, duly certified and deposited as aforesaid" (*q*).

(*p*) *Old Battersea and District Building Society* v. *Inland Revenue Commissioners.*

(*q*) 6 & 7 Will. 4, c. 32, s. 5.

If an incorporated society executes a reconveyance it must, by the express terms of sect. 42, be to the then owner of the equity of redemption, or to such persons and to such uses as he may direct. "I do not think any lawyer would say that the reconveyance authorized by the Act is authorized to be made to anybody but the person who at law is entitled to call for it. 'May indorse' merely means that the society may indorse a proper reconveyance upon the mortgage deed. But there is an alternative mode of proceeding. Instead of a reconveyance to the then owner of the equity of redemption the society may indorse a receipt, and then that receipt is to vacate the mortgage and vest the estate in the property 'in the person for the time being entitled to the equity of redemption.' Surely that is the same person as the owner of the equity of redemption in the former part of the section. They are equivalent words; the reconveyance is not to be to one person and the vesting to be in another. They are alternative modes of getting the legal estate into the same person, that is, in the owner for the time being of the equity of redemption"(*r*).

Reconveyance by unincorporated society.

If, however, a reconveyance were executed by a society governed by the Act of 1836, which merely authorizes the giving of a statutory receipt, then such a reconveyance would, it is conceived, be construed and have effect according to the same principles as any other conveyance. In a case under the Friendly Societies Act, 1875, which provides (*s*) that a receipt indorsed

(*r*) *Per* Jessel, M. R., in *Fourth City Mutual Benefit Building Society* v. *Williams* (1879), 14 Ch. D. p. 146.

(*s*) Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16,

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on or annexed to a mortgage to a friendly society shall vaacte the same and vest the property therein comprised in the person entitled to the equity of redemption, but says nothing about executing a reconveyance, the trustees of a society instead of giving a receipt executed a reconveyance by deed. It was argued that the same effect must be given to it as if they had given a statutory receipt; but the learned judge (North, J.) declined to adopt this view, holding that the legal estate passed to the grantee under the deed in the ordinary way, and that the rights of the parties must be regulated accordingly (*t*).

Costs of reconveyance.

The costs of a deed of reconveyance by an unincorporated society were disallowed by the taxing master on a taxation as between a solicitor and his client; but this decision was reversed by the Master of the Rolls on the ground that it was the duty of the master simply to tax the bill and not to inquire whether the business could have been done in a better way (*u*).

Statutory receipt.

The Courts have frequently been called upon to determine the precise effect to be given to a statutory receipt under the Building Societies Acts. Some of the cases have arisen in connection with societies governed by the Act of 1836, others in connection with societies incorporated under the Act of 1874; but the wording of the two statutes on this point is so similar that most of the authorities may, it is conceived, be considered as applying with almost equal force to either

sub-s. 7; now repealed, but substantially re-enacted by Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 53.

(*t*) *Carlisle Banking Co.* v. *Thompson* (1885), 28 Ch. D. 398; 33 W. R. 119; 53 L. T. 115.

(*u*) *Re Page* (No. 2) (1863), 32 Beav. 485.

Act. It appears then to be now settled that when a society, being a legal mortgagee, is paid off and gives a receipt in the prescribed form, the effect is to shift the legal estate out of the society and vest it in the person who in equity is best entitled to call for it, although such person may not be the one who paid off the society. Thus, if there are successive equitable mortgagees and the society is paid off by the mortgagor, the effect will be to vest the legal estate in the equitable incumbrancer who is first in point of time; but if the society is paid off by a subsequent equitable incumbrancer, who has no notice of prior incumbrances, then he, as having the best equity, will be the person in whom the legal estate will vest. The question in each case is, Who of all the persons interested in the equity of redemption has the best right to call for a conveyance of the legal estate? "It appears to me that the sole object of the Legislature was to provide a cheap statutory substitute for a reconveyance of the legal estate, and that the indorsed receipt was meant to operate in favour of the person or persons who might at its date have the best right to a conveyance of the property mortgaged" (*v*).

(*v*) *Per* Lord Watson, *Hosking* v. *Smith* (1888), 13 App. Cas. p. 586; 58 L. J. Ch. 367; 37 W. R. 257; 59 L. T. 565; and see *Pease* v. *Jackson* (1868), 3 Ch. 576; 37 L. J. Ch. 725; 17 W. R. 1; 32 J. P. 757; *Lawrence* v. *Clements* (1874), 31 L. T. 670; *Fourth City Mutual Benefit Building Society* v. *Williams* and *Marson* v. *Cox* (1879), 14 Ch. D. 140; 49 L. J. Ch. 245; 28 W. R. 572; 42 L. T. 615; *Robinson* v. *Trevor* (1883), 12 Q. B. D. 423; 53 L. J. Q. B. 85; 32 W. R. 374; 50 L. T. 190; *Sangster* v. *Cochrane* (1884), 28 Ch. D. 298; 54 L. J. Ch. 301; 33 W. R. 221; 51 L. T. 889; 1 T. L. R. 150; 49 J. P. 327; *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866; 77 L. J. Ch. 466; 99 L. T. 267; 24 T. L. R. 422; *Auckland Union Permanent Building Society* v. *Tate* (1882), 73 L. T. Journ. p. 100; *Stamers* v. *Preston* (1859), 9 Ir. C. L. R. 351. *Prosser* v. *Rice* (1859), 28 Beav. 68, is overruled.

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Pease v. *Jackson.*

In *Pease* v. *Jackson*, a legal mortgage was made to a building society and a subsequent equitable charge given to the plaintiffs. The defendants on the mortgagor's request paid off the society. A receipt was accordingly indorsed on the mortgage and the deeds handed to the defendants, and the mortgagor executed a fresh mortgage to them, receiving at the same time a further advance. The defendant had no notice of the plaintiffs' charge. Lord Romilly, M. R., held, following his own decision in *Prosser* v. *Rice*, that the plaintiffs were entitled to priority (*w*). On appeal, however, Lord Cairns reversed this decision, holding that the defendants had the better equity, and therefore that the rule "*Qui prior est tempore potior est jure*" did not apply; and he decided that on the satisfaction of the mortgage the legal estate vested either in the mortgagor or in the persons who had the best right to call for it, in either of which cases it had passed to the defendants. In the concluding portion of his judgment Lord Cairns stated that he had decided the case on the ground of the better equity, and this no doubt is the correct view. The decision was explained by Jessel, M. R., in a subsequent case as follows:—"As I understand the decision in *Pease* v. *Jackson*, it means this: the second mortgagee is asked to advance money to pay off the first mortgage. The second mortgagee says, 'Very well; I will pay the money due to the first mortgagee to the first mortgagee direct: I will take the deeds and the legal estate direct from him.' He goes to the first mortgagee with the assent of the

(*w*) *Pease* v. *Jackson* (1868), 3 Ch. 578, n.; 16 W. R. 58.

mortgagor: the first mortgagee happens to be a building society, and says, 'The way we convey a legal estate is by a receipt indorsed;' and thereupon the second mortgagee pays the money and takes away the deeds. It turns out afterwards that there is a secret mortgagee and equitable owner claiming under a security prior in date to the second mortgagee. As I understand, Lord Cairns says that by the transaction between the building society and the second mortgagee there is an implied, if not an express, contract between the society, or their trustees, and the mortgagee, that if he gives them the money they will give him the legal estate. Through something unknown to either the society or the second mortgagee there may be a question on the statute, but the delivery of the deeds to the second mortgagee is intended to operate in pursuance of that contract or arrangement, and the man who pays his money to the owner of the legal estate under such a contract, expressed or implied, has a better right to call for it than the man who paid and got nothing. That appears to be intelligible: I do not suppose that anybody would doubt that if the second mortgagee went to the first mortgagee and actually paid him money with the express contract to convey the legal estate, he would have a better right to call for it in respect of the money so paid than the man who paid and got nothing; and so, if it is implied by the contract that he is to have the legal estate, as I understand it was in *Pease* v. *Jackson*, he has the better title" (*x*).

(*x*) *Marson* v. *Cox* (1879), 14 Ch. D. p. 150; 49 L. J. Ch. 245; 28 W. R. 572; 42 L. T. 615; and see also *Robinson* v. *Trevor* (1883), 12 Q. B. D. p. 429; 53 L. J. Q. B. 85; 32 W. R. 374; 50 L. T. 193.

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Tacking further advance.

The further decision in *Pease* v. *Jackson*, however, viz., that under such circumstances there is no right to tack, did not commend itself to the Master of the Rolls (Sir George Jessel) and is no longer law, having been expressly overruled by the House of Lords in *Hosking* v. *Smith* (*y*). In that case a member of certain unincorporated societies mortgaged leaseholds to them and made a second mortgage to the respondents. He then borrowed 6,000*l*. from the appellants, 2,000*l*. of which was employed in paying off the societies, who handed over the deeds to the appellants with the usual indorsed receipts; and the mortgagor himself executed a mortgage to the appellants to secure the 6,000*l*. Neither the societies nor the appellants had any notice of the mortgage to the respondents. Under these circumstances it was held that the appellants had priority over the respondents, not only in respect of the moneys employed in paying off the building societies, but also in respect of the balance of the loan paid directly to the mortgagor. "In my opinion," said Lord Watson, "sect. 5 simply dispenses with the necessity for a formal deed, and vests the legal estate in the person entitled to it as fully and to the same effect as if he had actually obtained a conveyance. It does not prescribe the consequences which must attend the equivalent which it provides; it leaves them to be ascertained according to the existing law, and they must therefore be the same as if a conveyance had been executed" (*z*).

(*y*) (1888), 13 App. Cas. 582; 58 L. J. Ch. 367; 37 W. R. 257; 59 L. T. 565. *Pease* v. *Jackson* was followed in *Lawrence* v. *Clements*, *Robinson* v. *Trevor*, and *Sangster* v. *Cochrane*, all of which, therefore, so far as they decide that there is no right to tack in such a case must be taken to be overruled.

(*z*) 13 App. Cas. p. 591.

Sangster v. *Cochrane*

Sangster v. *Cochrane* (*a*) was a peculiar case. The facts were as follows: In 1872 four houses were mortgaged to a building society. In 1881 the plaintiff paid off the society at the mortgagor's request; a receipt was indorsed in the usual way, the deeds were handed to the plaintiff, and a mortgage was executed to him for a larger amount. The mortgagor having become bankrupt the plaintiff desired to take possession, and then discovered that in 1877 the mortgagor had sold and conveyed one of the houses to the defendant. The mortgagor, who was a solicitor, had acted for the defendant on the occasion of the sale, and had suppressed the fact of the mortgage to the society. Under these circumstances Mr. Justice Kay held, following the previous decisions, though not agreeing with them, that the effect of the receipt was to vest the legal estate in the plaintiff and give him, to the extent of the money he paid to the society, priority over the defendant.

Statutory receipt may be delivered as an escrow.

The receipt may be delivered merely as an escrow: see *Lloyd's Bank, Ld.* v. *Bullock* (*b*). In that case the owner of property in mortgage to a building society devised the equity of redemption to a trustee for sale. The solicitor of the society falsely and fraudulently represented to the society that notice had been given to pay off their mortgage, and the society accordingly indorsed the usual statutory receipt on the mortgage, and handed the deed to the solicitor to be delivered

(*a*) (1884), 28 Ch. D. 298; 54 L. J. Ch. 301; 33 W. R. 221; 51 L. T. 889; 1 T. L. R. 150; 49 J. P. 327.

(*b*) [1896] 2 Ch. 192; 65 L. J. Ch. 680; 44 W. R. 633; 74 L. T. 687; 12 T. L. R. 435.

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over by him on redemption. The solicitor then purchased the property from the trustee and obtained a conveyance, though the purchase-money was not in fact paid, and deposited the deeds, with the exception of the mortgage which he suppressed, with the plaintiffs as security for an advance. The solicitor became bankrupt, and the society, believing that he had received the money due to them and had parted with the mortgage on redemption, treated him as their debtor and proved for the amount in his bankruptcy, but on subsequently discovering their error withdrew their proof. It was held by Chitty, J., that the society were entitled under the circumstances to show (as the fact was) that they had never been paid off, that the statutory receipt was delivered only as an escrow, and that the legal estate being still in the society they had priority over the plaintiffs.

Effect of the receipt on the covenants in the mortgage.

Another question that has arisen in connection with this subject is as to the effect of a statutory receipt on the covenants in the mortgage.

Farmer v. *Smith*.

In *Farmer* v. *Smith* (*c*), the estimated duration of a terminating society was thirteen years. The Court held, first, that on the construction of the rules and the mortgage deed an advanced member was entitled to redeem on payment of his subscriptions to the end of the thirteenth year, but would remain liable to pay subscriptions until 120*l.* a share had been realised for every member; and secondly, that the covenant in the mortgage deed extended to the payment of these subscriptions subsequent to the thirteen years, and that

(*c*) (1859), 4 H. & N. 196; 28 L. J. Ex. 226; 5 Jur. N. S. 533, n.; 7 W. R. 362; 32 L. T. (O. S.) 371; 23 J. P. 230.

the right to sue on the covenant would not be affected by the indorsement of a receipt. See also *Sparrow* v. *Farmer* (*d*), cited *ante*, p. 271. Both these, it will be observed, were cases of terminating societies under the Act of 1836.

Harvey v. Municipal Building Society.

In *Harvey* v. *Municipal Permanent Investment Building Society* (*e*), however, where the society was permanent and incorporated, the Court of Appeal held that where a member has executed a mortgage to secure advances and all payments due from him to the society, the indorsement of a receipt in accordance with sect. 42 is absolutely conclusive as against the society, and precludes them from saying that anything remains due from the member, even though the receipt was given under a mistake. Cotton, L. J., in his judgment, says:—"We must give effect to the words of the Act, which say that the receipt 'shall vacate the mortgage or further charge or debt.' It is contended that the alternative form of the clause points to a difference between a mortgage and a debt, and that the latter word only refers to a case where there is no mortgage. But even if it were so it would come to the same thing, for if the mortgage is vacated, the debt due on the covenant in the mortgage is also vacated. The society has therefore precluded itself from saying that there is any debt due, even though the receipt was given under a mistake. The counsel for the respondents raised two points; the first was that if all the moneys were not in fact paid,

(*d*) (1859), 26 Beav. 511; 28 L. J. Ch. 537; 5 Jur. N. S. 530; 33 L. T. (O. S.) 216.

(*e*) (1883), 26 Ch. D. 273; 53 L. J. Ch. 1126; 32 W. R. 557; 51 L. T. 408.

Ch. VIII. the statutory effect of the receipt did not arise. But that is not so; to say that after the indorsement is made the parties were left free to re-open the question as to the amount due would be to repeal the section. The second argument was that [the] two alternative provisions are really only two alternative modes of re-vesting the property in the mortgagor, but such a contention would strike out part of the second alternative. The receipt has, under the statute, not only the effect of re-vesting the property, but also of vacating the mortgage; therefore, in my opinion, the receipt precludes the society from saying that anything remains due on the mortgage. Then, it is said that the debt on the plaintiff's original obligation on the shares still remains, though the mortgage is gone; but, in my opinion, it is clear that the mortgage covenant is to cover not only the mortgage money and interest but all the payments due on the shares, and even if all such payments have not been made, the debt is gone by reason of the indorsement. The case of *Sparrow* v. *Farmer* was referred to, but when we look at the facts of that case we find that all that was decided there was, that though the mortgage debt was so far gone that the shareholder was able to redeem his property, yet he still remained liable for payments in respect of shares still subsisting. But here all which was payable down to the time when the mortgage was satisfied is covered by the receipt, and there is no claim for payments accrued due since, but for sums due before the mortgage was vacated. Therefore that decision has no bearing on the present case." Lord Justice Fry in his judgment says:—"Then it was said that though the

liability on the mortgage was satisfied, the liability on the shares remained; but all liability on the shares was merged in the mortgage, and as that is vacated the debt is gone also." This case was followed by Mathew, J., in *London and County United Building Society* v. *Angell* (*f*), where, however, the learned judge said that fraud would be an exception.

Priestly v. *Hopwood.*

In *Priestly* v. *Hopwood* (*g*), the plaintiff executed a mortgage to the society in the usual way, and then sold the equity of redemption to the defendant, who covenanted to pay "all subscriptions and other payments which should become due thenceforth in respect of the plaintiff's shares by virtue of the rules of the society;" but the shares remained in the plaintiff's name. One of the rules provided that the managers might "determine the amount of money to be paid by any mortgagor in full for the claims of the society upon his property, on payment of which the share or shares in respect of which the security was made should become wholly extinguished." The society having passed a resolution enabling members to redeem their mortgages on payment of 60*l.* 10*s.* per share, the defendant paid this sum on each of the plaintiff's shares and the usual receipt was indorsed on the mortgage. The Court held that the effect of the resolution and receipt was to extinguish the plaintiff's shares, and consequently to release the plaintiff from all liability to the society and the defendant from all liability to the plaintiff.

(*f*) (1896), 65 L. J. Q. B. 194.

(*g*) (1864), 4 N. R. 239; 10 L. T. 646; 12 W. R. 1031; 28 J. P. 628; and see *Chatterton* v. *Corthorne*, June, 1879 (C. A.), cited in Serat. & Brab. on Building Societies, 2nd ed. p. 201.

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Arrears of interest.

Where the rules provided that ten per cent. should be charged on all interest in arrear, it was held in Scotland that the discharge, in common form, of the capital sum secured by a bond and the interest thereon, did not preclude the society from recovering under the rules the amount due for arrears of interest (*h*). No question, it would appear, arose in this case as to the effect of a statutory receipt.

Dower.

Where the heir-at-law of a deceased owner in fee, who had died intestate, executed a mortgage to the trustees of a building society to secure an advance, and the widow concurred in the assurance "for the purpose of extinguishing her right to dower," it was held that on the mortgage being paid off and a statutory receipt indorsed she was entitled to her dower out of the property (*i*).

Discharge of mortgage in the case of registered land.

When all moneys intended to be secured by any mortgage or charge to or in favour of any building society have been fully paid or satisfied, an instrument of discharge in the form provided by the Land Transfer Rules, under the seal of such society if incorporated, or under the hands and seals of the trustees for the time being of or acting in that matter for such building society, or other the proper officers thereof, if such society is not incorporated, and attested by the secretary, will have the same effect and operation in vacating the mortgage or charge, and in vesting the estate, and otherwise, as a receipt indorsed on such mortgage

(*h*) *Galashiels Provident Building Society* v. *Newlands* (1893), 20 Rettie, 821; 30 Sc. L. R. 730.

(*i*) *Meek* v. *Chamberlain* (1881), 8 Q. B. D. 31; 51 L. J. Q. B. 99; 30 W. R. 228; 46 L. T. 344.

or charge, duly made, signed, and attested in such form and manner and by such persons as is prescribed by, and otherwise in conformity with, the provisions of sect. 5 of the Building Societies Act, 1836, and sect. 42 of the Building Societies Act, 1874, respectively (*j*). This rule is applicable where the original charge has been filed in the registry. Where under rule 121 (*ante*, p. 265) the original has been retained by the society the usual statutory receipt can be indorsed on it, and on production at the registry the charge will be cancelled (*k*).

Yearly value of property.

It was held that in ascertaining the yearly value to an advanced member of the property mortgaged by him to the society for the purpose of determining whether he was entitled in respect of such property to a vote for the county, only so much of the instalments as consisted of interest was to be deducted; see *Rolleston* v. *Cope* (*l*). In that case the advance was repayable in ten years by monthly instalments, amounting in the whole to 41*l*. 8*s*. each year, two-thirds being in discharge of principal and one-third in payment of interest. The borrower had paid 350*l*., and two years remained during which he still had to pay the monthly instalments, but he was entitled to redeem by a present payment of 73*l*. 1*s*. The annual value of the property was 31*l*. 4*s*. The Court held that in ascertaining the yearly value of the estate to the member the interest

(*j*) Land Transfer Rules, 1903, 1907 and 1908, r. 167.
(*k*) See Brickdale & Sheldon, 2nd ed. p. 406.
(*l*) (1871), L. R. 6 C. P. 292; 1 Hop. & Colt. 488; 40 L. J. C. P. 160; 19 W. R. 927; 24 L. T. 390.

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CHAPTER IX.

THE MODE OF SETTLING DISPUTES BETWEEN A BUILDING SOCIETY AND ITS MEMBERS.

Settlement of disputes.

IT has always been the policy of the law to provide for the settlement of disputes between building societies and their members by some simpler and cheaper method than recourse to the ordinary tribunals, and special provision is made for this purpose by the Acts of Parliament by which these societies are governed. There is considerable difference, however, between the provisions applicable to incorporated and to unincorporated societies, and it will be convenient therefore to consider them separately, though many of the decided cases and the principles therein laid down apply equally to either class of society.

1. *Incorporated Societies.*

Three modes of settling disputes.

The Building Societies Act, 1874, contemplates three modes of settling disputes between an incorporated society and any of its members, or any person claiming by or through any member or under the rules, viz.:—

(1) Arbitration.

(2) A reference to the registrar.

(3) An application to the County Court of the district in which the chief office or place of meeting for the business of the society is situated.

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The rules of every society must state which of these three methods is to be adopted (*a*), and cannot provide for the adoption of more than one, whether generally or in particular cases or events, though the parties to a dispute may always agree to refer it to the registrar, in which case his award has the same effect as that of arbitrators (*b*).

What is a "dispute."

The meaning of the word "disputes," as used in the Building Societies Acts, has itself been the subject of much controversy, and particularly whether it included questions arising out of mortgages made to a society by its members, so as to oust the ordinary jurisdiction of the Courts. In the case of unincorporated societies, it was finally decided by the House of Lords in the case of *Mulkern* v. *Lord* (*c*), that a rule to the effect that any dispute between the society and a member should be referred to arbitration did not prevent a member who had executed a mortgage to the society from bringing an action in the Chancery Division for an account and general relief. But the Master of the Rolls, Sir George Jessel, held that this did not apply in the case of an incorporated society, and that where the rules of such a society directed a reference of disputes to arbitration the Court had no jurisdiction (*d*). This decision was followed by the Court of Appeal in *Hack* v. *London Provident Building Society* (*e*), and

(*a*) Building Societies Act, 1874, s. 16, sub-s. 9.
(*b*) *Ibid.* s. 34.
(*c*) (1879), 4 App. Cas. 182; 48 L. J. Ch. 745; 27 W. R. 510; 40 L. T. 594.
(*d*) *Wright* v. *Monarch Investment Building Society* (1877), 5 Ch. D. 726; 46 L. J. Ch. 649.
(*e*) (1883), 23 Ch. D. 103; 52 L. J. Ch. 541; 31 W. R. 392; 48 L. T. 247.

was finally approved and adopted by the House of Lords (Lords Blackburn and Watson, the Earl of Selborne, L. C., *diss.*) in *Municipal Permanent Investment Building Society* v. *Kent* (*f*).

Building Societies Act, 1884, s. 2.

In consequence of this decision the law was altered by the Building Societies Act, 1884, which provides that the word "disputes" in the Building Societies Acts, 1874 to 1884, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided, and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or any person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document other than the rules of the society, and shall not prevent any society or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled (*g*).

What cases within the section.

This section, it may be observed, follows very closely

(*f*) (1884), 9 App. Cas. 260; 53 L. J. Ch. 290; 32 W. R. 681; 51 L. T. 6; 48 J. P. 532.

(*g*) Building Societies Act, 1884, s. 2. Even before this Act, it had been held by Pearson, J., that where a society sold to one of its members property mortgaged to it by other members, and the mortgagors brought an action to set aside the sale on various grounds of fraud, the action could not be referred: *French* v. *Municipal Permanent Building Society* (1884), 53 L. J. Ch. 743; 50 L. T. 567; and see *Hastie* v. *First Edinburgh and Leith* 415*th Starr-Bowkett Building Society* (1884), 21 Sc. L. R. 284.

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the language of the Earl of Selborne in his speech in the case of *Municipal Permanent Investment Building Society* v. *Kent*, but, nevertheless, it has not been found very easy of construction. It has been decided, however, that the words "any such mortgage" in the latter part of the section refer to *any* mortgage made to a society by one of its members, and not only to mortgages as to the construction or effect of which there is a dispute, and consequently that the statute is no bar to an action by the society to recover money due from a member under a covenant in a mortgage (*h*); and it has also been held that a claim by a society against one of its officers for misappropriating and keeping in his hands moneys of the society is not a dispute between the society and a member "in his capacity of a member" within the meaning of the section, that must be referred to arbitration (*i*). Nor is an action by a member against the secretary for a *mandamus* to compel him to prepare a statement of accounts in accordance with sect. 40 of the Act of 1874, a dispute that must be referred to arbitration, for the society is no party to it (*j*).

Scope and meaning of the Act.

In his judgment in *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin*,

(*h*) *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin* (1886), 17 Q. B. D. 66, 609; 55 L. J. Q. B. 382; 34 W. R. 630; 54 L. T. 822; 2 T. L. R. 502, 672; 51 J. P. 36.

(*i*) *Municipal Permanent Investment Building Society* v. *Richards* (1888), 39 Ch. D. 372; 58 L. J. Ch. 8; 37 W. R. 184; 58 L. T. 931; 59 L. T. 883; and see *Sinden* v. *Banks* (1861), 3 E. & E. 623; 30 L. J. Q. B. 102; 7 Jur. N. S. 910; 9 W. R. 415; 3 L. T. 775; *S. C.*, *nom. Lindon* v. *Banks*, 25 J. P. 390, cited *post*, p. 346.

(*j*) *Armour* v. *Marshall*, C. A., November 24th, 1887.

Lord Justice Fry made the following observations on the scope and meaning of the Act: "There are three sorts of disputes which may occur between a building society and one of its members: first, disputes arising out of the social contract; secondly, disputes collateral to the social contract, such as those arising out of mortgages between the society and its members; and thirdly, disputes entirely extraneous to the social contract, such as a dispute in respect of work done by a member for the society. It is clear that the third class of disputes does not come within the scope of the rule in question. But shortly before the passing of the Act of 1884 it was decided, in *Municipal Permanent Investment Building Society* v. *Kent*, that disputes arising out of contracts collateral to the social contract, the second class of disputes, came within the scope of the rule. Sect. 2 of the Act of 1884 may be divided into three parts. The first part provides that the word '"disputes" . . . . in the rules of any society shall be deemed to refer only to disputes between the society and a member, or any representative of a member, in his capacity of a member of the society,' unless otherwise expressly provided. It is contended that the words 'in his capacity *as** a member' qualify only the words 'any representative of a member,' but I do not so read them. Looking at the subsequent portions of the section, and having regard to the case of *Municipal Permanent Investment Building Society* v. *Kent*, it seems to me that they also qualify the word 'member.' The second part of the section provides that the word 'disputes' shall not apply to any dispute as to the construction or effect of any mortgage deed in the absence of

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* *Sic.*

CHAP. IX. express provision. It seems to me that the words in the first part of the section, 'in his capacity of a member of the society,' refer to disputes arising out of the social contract that binds the members of the society together. Then as the most frequent disputes not arising out of that social contract were those arising out of mortgages, the legislature further emphasized, as to these disputes, what had already been impliedly enacted, by providing that in the absence of express provision any dispute as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society shall be entirely outside the arbitration clause. But other questions may arise as to mortgages, besides questions as to their construction or effect; and therefore the Act further provides that the arbitration clause shall not prevent any society or any member from obtaining in the ordinary course of law any remedy in respect of any mortgage" (*k*). So, where an advanced member claimed the return of his pass-book, the figures in which he alleged had been altered by the society, or in the alternative a declaration that the amount of the payments made by him was 155*l.* and not 137*l.*, as shown by the altered book, the Court held that the action could not be referred (*l*).

Withdrawing member.

A claim for payment by a member who has given notice to withdraw, he alleging that the society have

(*k*) 17 Q. B. D. p. 617. For further discussion as to the meaning of the word "disputes" in the Act, see the judgment of Denniston, J., in *McSeveny* v. *Canterbury Co-operative Freehold Land Association* (1889), 8 N. Z. L. R. 534.

(*l*) *Newsham* v. *Third Starr-Bowkett Blackburn Building Society*, Divisional Court, May 20th, 1895.

funds sufficient to pay him and they contending that they have not, is clearly a "dispute" that must be referred to arbitration (*m*); and a claim by a depositor (if bound by the rules) for repayment of a sum wrongly paid away by the society would also have to be referred (*n*).

Depositor.

So, where the question is whether certain acts of the society are *ultra vires*, or not, it would seem to be a case for arbitration (*o*). But there must be an actual 'dispute' between the parties,—there can be no proper reference when the supposed disputants are really maintaining the same view (*p*.) If the real question is whether a person is a member or not, an action and not a reference seems to be the proper remedy: see the cases cited *post*, p. 345.

Ultra vires.

Disputed membership.

Where the matter in difference is one that ought to be referred to arbitration, no action will be allowed to proceed except under very special circumstances. The Court has jurisdiction, however, to appoint a receiver

Action will be stayed.

(*m*) *Walker* v. *General Mutual Building Society* (1887), 36 Ch. D. 777; 57 L. T. 574; 3 T. L. R. 847; 52 J. P. 278; and see the other cases cited *post*, p. 347.

(*n*) *Melrose* v. *Adam* (1897), 24 Rettie, 481; 34 Sc. L. R. 519, decided under the Savings Banks Acts Amendment Act, 1863.

(*o*) See *Stone* v. *Liverpool Marine Society* (1894), 63 L. J. Q. B. 471; 10 R. 592, decided under the Friendly Societies Act, 1875; *Cox* v. *Hutchinson*, [1910] 1 Ch. 513; 79 L. J. Ch. 259; 102 L. T. 213; 26 T. L. R. 263; 54 S. J. 271, decided under the Industrial and Provident Societies Act, 1893; but see *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A. C. 548; 88 L. J. Ch. 59; 35 T. L. R. 354, under the same Act, where it was held that a dispute whether certain new rules which had been adopted by the society were illegal, as in unreasonable restraint of trade and *ultra vires* the society, was not a dispute that must be referred to arbitration, and that an action was therefore competent.

(*p*) *Hastie* v. *First Edinburgh and Leith* 415*th Starr-Bowkett Building Society* (1884), 21 Sc. L. R. 284; and see *Melbourne Permanent Building Society* v. *Taylor* (1896), 21 V. L. R. 716.

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Where the rules direct a reference to arbitration.

1. Where the rules of the society direct disputes to be referred to arbitration, arbitrators must be named and elected in the manner such rules provide; or, if there be no such provision, at the first general meeting of the society, none of the arbitrators being beneficially interested, directly or indirectly, in its funds. Of these arbitrators a certain number, not less than three, must be chosen by ballot in each case of dispute, the number of the arbitrators and mode of ballot being determined by the rules of the society. The names of the arbitrators must be duly entered in the minute book of the society, and, in case of the death or refusal or neglect of any of the arbitrators to act, the society, at a general meeting, must name and elect an arbitrator to act in the place of the arbitrator dying or refusing or neglecting to act (*s*).

Selection of arbitrators.

The provision directing that arbitrators shall be elected at the first general meeting of the society is to be considered as directory merely, and not compulsory;

(*q*) *Law* v. *Garrett* (1878), 8 Ch. D. 26; 26 W. R. 426; 38 L. T. 9; *Halsey* v. *Windham* (1882), W. N. 108; L. J. N. C. 90.
(*r*) *Compagnie du Sénégal* v. *Woods* (1883), 53 L. J. Ch. 166; 32 W. R. 111; 49 L. T. 527; W. N. 180; *Pini* v. *Roncoroni*, [1892] 1 Ch. 634; 61 L. J. Ch. 218; 40 W. R. 297; 66 L. T. 255.
(*s*) Building Societies Act, 1874, s. 34.

and if for any reason it happened that the arbitrators could not be chosen at the first meeting, an appointment at a second, and perhaps at a third meeting, would not necessarily be bad (*t*).

Appointment of arbitrators after writ issued.

And there is no objection, it seems, to the society appointing arbitrators after a dispute has arisen and a writ has been issued against the society, and insisting on having the matter referred; see *Norton* v. *Counties Conservative Permanent Benefit Building Society* (*u*). In that case the plaintiff (a withdrawing member) issued her writ on September 18th, 1894, when out of the five arbitrators originally appointed, three only were living. On October 24th, the society took out a summons for a stay of proceedings and a reference to arbitration; on November 12th, Day, J., at chambers, made an order in the terms of the summons; and on November 29th two additional arbitrators were appointed. The Court of Appeal (Lindley and A. L. Smith, L. JJ.) held that there was no objection to the appointment, and they dissented from the view expressed by Mr. Justice North in *Christie* v. *Northern Counties Permanent Benefit Building Society* (*v*), that the

(*t*) *Per* North, J., *Christie* v. *Northern Counties Permanent Benefit Building Society*, 43 Ch. D. p. 66. "There is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory. The precise time, in many cases, is not of the essence": *per* Ld. Mansfield, C. J., *R.* v. *Loxdale* (1758), 1 Bur. 447. See further, as to the distinction between directory and imperative provisions in an Act of Parliament, *Pearse* v. *Morrice* (1834), 2 A. & E. p. 96; 4 N. & M. 48; *R.* v. *Leicester* (1827), 7 B. & C. 6; 9 D. & R. 772; Maxwell on Statutes, 4th ed. p. 554.

(*u*) [1895] 1 Q. B. 246; 43 W. R. 178; 71 L. T. 790; 14 R. 263; 59 J. P. 149.

(*v*) (1890), 43 Ch. D. 62; 59 L. J. Ch. 210; 38 W. R. 280; 61 L. T. 796; and see *Galashiels Provident Building Society* v. *Newlands*, cited *post*, p. 336.

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omission of the society to appoint arbitrators remitted a member to his common law right of bringing an action, holding that his proper course under such circumstances was to apply for a *mandamus* to compel the society to appoint arbitrators.

Omission to appoint arbitrators.

The decisions in these last two cases may have been correct, but some of the observations of the learned judges seem open to comment. In neither case was the attention of the Court called to sect. 35 (1) of the Act of 1874, which provides that if an application for the settlement of a dispute by arbitration is not complied with within forty days, the County Court may determine the dispute. The right course, therefore, seems to be for the aggrieved member to wait forty days after applying for a reference, and if at the end of that time there are either no proper arbitrators or not a sufficient number of them, then to go to the County Court; see this question discussed in the chief registrar's Report for 1894, p. 54, where he points out the insufficiency of the remedy by *mandamus*. It may also be observed, that in *Norton's Case* the two additional arbitrators were appointed by the board. This was in accordance with the rules of the society, but not with sect. 34 of the Act, which expressly provides that vacancies shall be filled up by the society in general meeting; this point, however, does not seem to have been taken.

Where decision of the board a condition precedent to arbitration.

Where under the rules the right to demand arbitration only arose in cases "in which the decision of the directors should be deemed unsatisfactory," and a claim was made against the society, which the board neither admitted nor rejected for nearly nine months, the Court

granted a rule calling on them to hear and determine the matter (*w*). CHAP. IX.

The award of the arbitrators or the major part of them, "according to the true purport and meaning of the rules of the society" (*x*), will determine the dispute (*y*), and there is no appeal whatever from their decision, nor can the proceedings be removed into any Court or restrained by injunction (*z*). Award is final.

The arbitrators may, however, at the request of either party, state a case for the opinion of the Supreme Court on any question of law (*a*), though they are no longer compellable to do so, the Building Societies Act, 1894, now providing that notwithstanding anything contained in the Arbitration Act, 1889, or in any other Act, the arbitrators, registrar, or Court to whom a dispute is referred in pursuance of the Building Societies Act, 1874, shall not be compelled to state a special case on any question of law arising in the case, but may do so on the request of either party as provided in sect. 36 of the Building Societies Act, 1874 (*b*). A case cannot be stated after an award has once been made (*c*). Questions of law. Arbitrators not to be compelled to state special case on settlement of disputes.

(*w*) *Ex parte Young* (1896), 40 Sol. J. 338.

(*x*) These words, it has been said, refer not to the award, but to the "major part" of the arbitrators; see *Municipal Building Society* v. *Kent* (1884), 9 App. Cas. p. 284, *per* Lord Watson; but see *contra*, *R.* v. *Grant*, cited *infra*, p. 341.

(*y*) Building Societies Act, 1874, s. 34.

(*z*) *Ibid.* s. 36.

(*a*) *Ibid.*

(*b*) Building Societies Act, 1894, s. 20. This gets rid (so far as incorporated societies are concerned) of the decision in *Tabernacle Permanent Building Society* v. *Knight*, [1892] A. C. 298; 62 L. J. Q. B. 50; 41 W. R. 207; 67 L. T. 483; 56 J. P. 709; 8 T. L. R. 616, where it was held that under sect. 19 of the Arbitration Act, 1889, the arbitrators could be compelled to state a case.

(*c*) *Smith* v. *Scottish Legal Life Assurance Society*, [1912]

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Appeal. It would seem that the jurisdiction of the Court on a case stated by an arbitrator under sect. 36 is consultative only, and that no appeal lies from the opinion expressed (*d*); nor can the Court make any order as to costs (*e*). If the opinion is erroneous, however, an award expressed to be founded on it can be set aside as containing an error of law apparent on the face of the award (*f*).

Discovery. The arbitrators may also grant such discovery, as to documents and otherwise, as on November 2nd, 1874, could be granted by any Court of law or equity, such discovery to be made by such officer of the society as the arbitrators may determine (*g*).

Costs. The costs of the reference are in the discretion of the arbitrators (*h*).

Form of award. The award need not be in any particular form, except that it must limit a time within which it is to be complied with (*i*), but the form prescribed by sect. 27 of the Act 10 Geo. 4, c. 56, *post*, p. 340, may conveniently be adopted.

Clerical mistake. Any clerical mistake or error

S. C. 611, Ct. of Sess.; 49 Sc. L. R. 457, decided under the Friendly Societies Act, 1896.

(*d*) See *Re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613; 62 L. J. Q. B. 33; 41 W. R. 35; 67 L. T. 403; 8 T. L. R. 783, decided under sect. 19 of the Arbitration Act, 1889, where the words are "state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

(*e*) *Ibid.*

(*f*) *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 Sol. J. 734.

(*g*) Building Societies Act, 1874, s. 36.

(*h*) Arbitration Act, 1889 (52 & 53 Vict. c. 39), ss. 2, 24; see *Batchelor* v. *First Wigan Economic Building Society*, cited *infra*, p. 338.

(*i*) Building Societies Act, 1874, s. 34.

in the award, arising from any accidental slip or omission, may be corrected by the arbitrators or umpire (*j*).

A member does not lose the benefit of an award made in his favour because the society goes into liquidation before he has been paid; if duly arrived at during the life of the society the award remains binding for all purposes (*k*).

Enforcing award.

Should either of the parties to the dispute refuse or neglect to comply with or conform to the award within the time limited therein, the County Court, upon good and sufficient proof being adduced of the award having been made and of the refusal of the party to comply therewith, will enforce compliance (*l*).

Procedure to enforce decision or award.

Every application for the enforcement of a decision on a dispute given by any authority other than the County Court, or for the enforcement of an award, must be commenced by plaint and summons in the ordinary way, in which the party to the dispute or award entitled or claiming to be entitled to the benefit of such decision or award will be plaintiff, and the party against whom such decision or award is given will be defendant; and particulars of demand must be filed with the application, stating concisely the relief or order which the plaintiff claims (*m*).

Refusal or failure to arbitrate.

If either party to the dispute declines to arbitrate, or the arbitrators fail to make any award, application must be made to the County Court (*n*).

(*j*) See Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7 (c), s. 24.
(*k*) *Barnard* v. *Tomson*, [1894] 1 Ch. p. 391, North, J.
(*l*) Building Societies Act, 1874, ss. 4, 34.
(*m*) County Court Rules, 1903, Ord. XLI. r. 4.
(*n*) Building Societies Act, 1874, s. 35, sub-s. 1; and see *post*, p. 339, as to the mode of application.

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As to the distinction between no award and an improper award, see *Bache* v. *Billingham* (*o*), and *R.* v. *Grant* (*p*), cited *post*, p. 341.

Where the rules directed disputes to be referred, but there was no provision as to the manner in which arbitrators should be elected, and none in fact had ever been elected, the Court of Session held, in an action by the society against a member in the Sheriff Court, that sect. 35 had no application, but that the Sheriff had jurisdiction to entertain the action at common law, and his decision was therefore subject to appeal (*q*).

Arbitration Act, 1889.

It is important to observe that the Arbitration Act, 1889, applies to every arbitration under any Act passed either before or after August 26th, 1889, as if the arbitration were pursuant to a submission, except in so far as the provisions of the Act of 1889 are inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by such Act (*r*). As to the meaning of "inconsistent with the Act regulating the arbitration," see *Re Knight and Tabernacle Permanent Building Society* (*s*), though the decision in this case no longer applies in the case of an incorporated society; see *ante*, p. 333.

(*o*) [1894] 1 Q. B. 107; 63 L. J. M. C. 1; 42 W. R. 217; 69 L. T. 648; 58 J. P. 181; 9 R. 79.

(*p*) (1849), 14 Q. B. 43; 19 L. J. M. C. 59; 13 Jur. 1026.

(*q*) *Galashiels Provident Building Society* v. *Newlands* (1893), 20 Rettie, 821; 30 Sc. L. R. 730. But see *ante*, p. 331.

(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24.

(*s*) [1891] 2 Q. B. 63; 60 L. J. Q. B. 633; 39 W. R. 507; 64 L. T. 204; 65 L. T. 550; 55 J. P. 534; 7 T. L. R. 286, 544; affirmed in D. P., [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; 41 W. R. 207; 56 J. P. 709; 8 T. L. R. 616.

Determination of disputes by registrar.

2. The registrar may determine a dispute in the following cases:—

(a) Where the parties to the dispute agree to refer it to him (*t*).

(b) Where the rules of the society direct disputes to be referred to the registrar (*u*).

Submission.

The submission of a dispute to the registrar must be in duplicate in the form AG. given in the Regulations (*v*).

Refusal of either party to proceed.

Where the rules of the society provide that disputes shall be submitted to the registrar, and either party to the dispute refuses or neglects to fill up and sign or seal the portion of the submission relating to his or its case, the other party may send the submission to the registrar. The registrar may require either party to support any statement in the submission by statutory declaration (*w*), and if he desires the parties to appear, he must give them notice of hearing in the form AH. in the Regulations (*x*).

Award.

The registrar's award will have the same effect as that of arbitrators (*y*); it must be in a prescribed form AI., and a fee of three pounds will be payable for it (*z*). If more than one hearing or an adjournment becomes necessary, an additional pound will be payable for every hearing after the first, and for every adjournment (*a*).

(*t*) Building Societies Act, 1874, s. 34.
(*u*) *Ibid.*
(*v*) Building Society Regulations, 1895, r. 32.
(*w*) *Ibid.*
(*x*) *Ibid.* r. 33.
(*y*) Building Societies Act, 1874, s. 34.
(*z*) Regulations, rr. 34, 41, as altered.
(*a*) *Ibid.* r. 41.

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Decision is final. The decision of the registrar is absolutely final, but he may state a case for the opinion of the Supreme Court on any question of law, and may grant discovery (*c*). An order for discovery must be in the prescribed form AK. (*d*); a fee of one pound will be payable for the order (*e*).

Costs. If the registrar in making his award has omitted to deal with the costs the County Court, it seems, has no jurisdiction to supply the omission (*f*).

Enforcing decision. As to the mode of enforcing the registrar's decision, see *ante*, p. 335.

Determination of disputes by County Court. 3. A dispute may be determined by the County Court in the following cases (*g*):—

(a) Where application has been made by either party to the other to have the dispute settled by arbitration under the rules, and such application has not been complied with within forty days (*h*).

(b) Where arbitrators have refused or have for twenty-one days neglected to make any award.

(*b*) Regulations, r. 42, as altered.

(*c*) Building Societies Act, 1874, s. 36; Building Societies Act, 1894, s. 20.

(*d*) Regulations, r. 35.

(*e*) *Ibid.* r. 41, as altered.

(*f*) *Batchelor* v. *First Wigan Economic Building Society*, Wigan Cty. Ct., Sept. 19th, 1899.

(*g*) Building Societies Act, 1874, s. 35.

(*h*) It has been held in the case of a friendly society that if a right to go to the Court, by reason of the lapse of the forty days, has once vested, the right will not be lost by an alteration of the rules: see *Ritson* v. *Dobson* (1911), 104 L. T. 808, cited *ante*, p. 74.

(c) Where the rules direct disputes to be referred to the Court.

(d) Where the rules direct disputes to be referred to justices, the jurisdiction of the latter being thus wholly excluded, even if specified in the rules.

Procedure.

Every dispute referred to the Court must be referred by plaint and summons in the ordinary way, the claiming or aggrieved member (or other person) being plaintiff and the society defendant; and particulars of demand must be filed stating concisely the nature of the dispute referred, and the relief or order which the plaintiff claims (*i*).

Decision is final.

The decision of the County Court judge will be final, but he may state a case for the Supreme Court on any question of law, and may grant discovery (*j*).

2. *Unincorporated Societies.*

Settlement of disputes in unincorporated society.

The statutory provisions relating to the settlement of disputes in the case of unincorporated societies are contained in sects. 27, 28 and 29 of the Act 10 Geo. 4, c. 56, and sects. 7 and 8 of the Act 4 & 5 Will. 4, c. 40. They may be summarized as follows:—

Rules must direct whether disputes shall be settled by arbitration or justices.

The rules must state whether a reference of every matter in dispute between the society, or any person acting under them, and any individual member thereof, "or person claiming on account of any member," shall be made to arbitrators, or to the justices of the peace for the county in which the society is formed (*k*).

(*i*) County Court Rules, 1903, Ord. XLI. rr. 1, 2, 3.
(*j*) Building Societies Act, 1874, s. 36; Building Societies Act, 1894, s. 20.
(*k*) 10 Geo. 4, c. 56, s. 27.

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Where rules direct a reference to arbitration.

1. If the rules direct a reference of disputes to arbitration, arbitrators must be elected by the society, or general committee thereof, none of the arbitrators being beneficially interested, directly or indirectly, in the funds of the society, of whom a certain number, not less than three, must be chosen by ballot in each case of dispute, the number of the arbitrators and mode of ballot being determined by the rules of the society. The names of the arbitrators must be duly entered in the book of the society in which the rules are entered, and in case of death, or refusal or neglect of any or all of the arbitrators to act, the society or general committee must elect others in their stead (*l*).

Form of award.

The award of the arbitrators, or the major part of them, "according to the true purport and meaning of the rules of the society," must be in the following form:—

> We, the major part of the arbitrators duly appointed by the Society established at , in the county of , do hereby award and order, that A. B. [*specifying by name the party or the officer of the society*] do, on the day of , pay to C. D. the sum of [*or* we do hereby reinstate in *or* expel A. B. from the said society, *as the case may be*]. Dated this day of One thousand nine hundred and .
>
> E. F.
> G. H.

Award is final.

The award will be binding and conclusive on all parties, and will be final, nor can it be removed into any court or restrained by injunction (*m*).

Award must be according to the rules.

The arbitrators must, however, make their award "according to the true purport and meaning of the

(*l*) 10 Geo. 4, c. 56, s. 27.
(*m*) *Ibid.*

rules of the society," and where the rules required them to hear evidence on both sides, it was held that arbitrators who refused to hear the evidence of one side had not made an award final and binding within the terms and intention of the Act, and consequently that the justices had jurisdiction (*n*). In *Municipal Building Society* v. *Kent* (*o*), however, Lord Watson, on the almost identical language of the Building Societies Act, 1874, s. 34, expressed the opinion that the words "according to the true purport and meaning of the rules" referred to the "major part" of the arbitrators and not to the award.

Award may be enforced by justices.

Should either of the parties in dispute refuse or neglect to comply with the decision of the arbitrators, or the major part of them, any one justice of the peace residing within the county within which the society is held, upon good and sufficient proof being adduced before him of such award having been made, and of the refusal of the party to comply therewith, upon complaint made by or on behalf of the party aggrieved, may summon the person against whom such complaint shall be made to appear at a time and place to be named in such summons; and upon his appearance, or in default thereof, upon due proof, upon oath, of the service of such summons, any two justices of the peace may proceed to make such order thereupon as to them may seem just; and if the sum of money awarded, together with a sum for costs not exceeding the sum of ten

(*n*) *R.* v. *Grant* (1849), 14 Q. B. p. 63; 19 L. J. M. C. 59; 13 Jur. 1026; distinguished in *Bache* v. *Billingham*, [1894] 1 Q. B. 107; 63 L. J. M. C. 1; 42 W. R. 217; 69 L. T. 648; 58 J. P. 181; 9 R. 79, where an award had been made, though improperly.
(*o*) (1884), 9 App. Cas. p. 284.

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Refusal to arbitrate or make an award.

Where the rules direct a reference to arbitration, and the society does not within forty days comply with a request to arbitrate, or the arbitrators neglect or refuse to make an award, the dispute may be determined by two justices (*q*).

Where rules direct a reference to justices.

2. Where the rules direct that any matter in dispute shall be decided by justices of the peace, any justice, on complaint being made to him of any refusal or neglect to comply with the rules of the society by any member or officer thereof, may summon the person against whom such complaint shall be made to appear at a time and place to be named in such summons, and upon his appearance, or in default thereof, upon due proof, on oath or affirmation, of the service of such summons, any two justices may proceed to hear and determine the complaint according to the rules of the society. And any award for the payment of money may be enforced in the manner directed to be used in case of neglect to comply with the decision of arbitrators (*r*).

Orders of justices to be final.

Every sentence, order, and adjudication of the justices will be absolutely final and conclusive to all

(*p*) 10 Geo. 4, c. 56, s. 27.
(*q*) 4 & 5 Will. 4, c. 40, s. 7.
(*r*) 10 Geo. 4, c. 56, s. 28.

intents and purposes, and cannot be removed into any court of law or restrained by injunction (*s*).

Provision in case of expulsion.

If a member has been expelled, and either arbitrators or justices order him to be reinstated, they may, in default of reinstatement, award him a sum of money (*t*).

What is a "dispute" within the Acts.

There has been some difference of opinion as to what is a "dispute" within the meaning of the above provisions; but it may, it is conceived, be taken to be now settled that the parties will not be compelled to arbitrate, and so deprived of their ordinary right to have recourse to a court of law, except in a case where the dispute is—(1) between the society and one of its members simply *quâ* member; and (2) of such a character that the machinery provided by the Acts is adequate to its complete settlement. When the relation of mortgagor and mortgagee has once been created between a member and the society, it is well settled that the provisions as to arbitration no longer apply.

"When," said Lord Hatherley, "you come to look into the authorities which were cited, they amount to this, that where the case went beyond the internal arrangements of the society, and introduced something which might be within their functions in the ordinary course of their business, but yet still outside the whole scheme and scope of the society itself, then a person who had a much larger interest than any of those contemplated among the ordinary members could not be deprived of recourse to the ordinary tribunals of the land. And more especially he could not be so deprived

(*s*) *Ibid.* s. 29.
(*t*) 4 & 5 Will. 4, c. 40, s. 8.

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Where an action, and not a reference to arbitration, is the proper remedy.

The following have been held to be disputes that must be settled by action or suit, and could not be referred to arbitration:—

An action by an advanced member against the trustees of the society, who were mortgagees in possession under mortgages amounting to upwards of 16,000*l*., for an account and general relief, the rules simply directing that disputes between a member and the society should be referred to arbitration pursuant to the 10 Geo. 4, c. 56 (*v*):

An action of ejectment by trustees against an advanced member who had mortgaged leaseholds

(*u*) *Mulkern* v. *Lord*, 4 App. Cas. p. 192.

(*v*) *Mulkern* v. *Lord* (1879), 4 App. Cas. 182; 48 L. J. Ch. 745; 27 W. R. 510; 40 L. T. 594; 43 J. P. 492; and see *Morrison* v. *Glover* (1849), 4 Ex. 430; 19 L. J. Ex. 20; 14 L. T. (O. S.) 204; 14 J. P. 84, which is indistinguishable from *Mulkern* v. *Lord*.

to the society by sub-demise with a clause of forfeiture in certain events (*w*):

An action by trustees against a member on a covenant in a mortgage deed for payment of the subscriptions and interest payable on his shares (*x*):

A suit for redemption by an advanced member against the trustees (*y*):

An action by an advanced member for a discharge of his mortgage and delivery up of his title deeds, and for repayment of moneys alleged to have been paid by him in excess of the proper amount through mistake of fact (*z*):

An action by an advanced member to recover income-tax which the society had refused to allow him to deduct, and which he had therefore paid under protest (*a*):

An action by a transferee of shares against the trustees for refusing to admit him to the privileges of membership, the trustees insisting that he was not a member (*b*), a dispute as to whether a person *is a member or not* clearly not being a

(*w*) *Doe* d. *Morrison* v. *Glover* (1850), 15 Q. B. 103; 15 L. T. (O. S.) 111; and see *Heydon* v. *Lillis* (1907), 7 S. R. 684, N. S. Wales.

(*x*) *Farmer* v. *Giles* (1860), 5 H. & N. 753; 30 L. J. Ex. 65; 8 W. R. 649; 2 L. T. 387; 24 J. P. 663; and see *Cutbill* v. *Kingdom* (1847), 1 Ex. 494; 17 L. J. Ex. 177.

(*y*) *Fleming* v. *Self* (1854), 3 De G. M. & G. 997; 24 L. J. Ch. 29; 1 Jur. N. S. 25; 3 Eq. Rep. 14; 3 W. R. 89; 24 L. T. (O. S.) 101; 18 J. P. 772.

(*z*) *Buckle* v. *Lordonny* (1887), 56 L. J. Ch. 437; 35 W. R. 360; 56 L. T. 273; 3 T. L. R. 369; 51 J. P. 422.

(*a*) *Raffles* v. *Gateshead Conservative Permanent Benefit Building Society* (1889), 86 L. T. Journ. 410.

(*b*) *Prentice* v. *London* (1875), L. R. 10 C. P. 679; 44 L. J. C. P. 353; 33 L. T. 251; 39 J. P. 711.

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dispute between the society and the plaintiff as a member (*c*):

An action by the trustees of a society against the treasurer for money which he had received and had failed to pay over to them (*d*):

A suit by an unadvanced withdrawing member for an account and payment of what should be found due (*e*).

Redemption.

In *R.* v. *Trafford* (*f*), a dispute arose between the society and a withdrawing member as to the terms on which he was entitled to redeem a mortgage. The society refused to refer the dispute to arbitration, and two justices therefore made an order under 4 & 5 Will. 4, c. 40, s. 7. It was held that they had no

(*c*) *Per* Brett, J., L. R. 10 C. P. p. 687; and see *Willis* v. *Wells*, [1892] 2 Q. B. 225; 61 L. J. Q. B. 606; 41 W. R. 64; 67 L. T. 316; 56 J. P. 775; 8 T. L. R. 653, where a member of a Friendly Society had been expelled, and the Court held they had jurisdiction to restrain the Society from excluding him; *Palliser* v. *Dale*, [1897] 1 Q. B. 257; 66 L. J. Q. B. 236; 45 W. R. 291; 76 L. T. 14; 13 T. L. R. 147, and *Andrews* v. *Mitchell*, [1905] A. C. 78; 74 L. J. K. B. 333; 91 L. T. 537, to the like effect; *Symington's Executors* v. *Galashiels Co-operative Store Co., Limited* (1894), 21 Rettie, 371; 31 Sc. L. R. 253, distinguished in *Crichton* v. *Trustees of the Dalry Myrtle Lodge of Free Gardeners* (1904), 41 Sc. L. R. 337; *McGowan* v. *City of Glasgow Friendly Society*, [1913] S. C. 991; 50 Sc. L. R. 783, where the Society had acted in breach of its own rules.

(*d*) *Sinden* v. *Banks* (1861), 3 E. & E. 623; 30 L. J. Q. B. 102; 7 Jur. N. S. 910; 9 W. R. 415; 3 L. T. 775; *S. C., nom. Lindon* v. *Banks*, 25 J. P. 390; and see *Winter* v. *Wilkinson*, [1915] 1 Ch. 317; 84 L. J. Ch. 237; 112 L. T. 482; 79 J. P. 241; 13 L. G. R. 425; 31 T. L. R. 121; *Municipal Permanent Investment Building Society* v. *Richards* (1888), 39 Ch. D. 372; 58 L. J. Ch. 8; 37 W. R. 184; 58 L. T. 931; 59 L. T. 883, cited *ante*, p. 148; *Mullock* v. *Jenkins* (1851), 14 Beav. 628.

(*e*) *Smith* v. *Lloyd* (1859), 26 Beav. 507; *Doubleday* v. *Hosking* (1873), 15 Eq. 344, n., *sed qu.*; and see *Thompson* v. *Planet Building Society*, cited *infra*.

(*f*) (1854), 4 El. & Bl. 122; 24 L. J. M. C. 20; 1 Jur. N. S. 252; 24 L. T. (O. S.) 308; 19 J. P. 6.

jurisdiction, the dispute having arisen not solely from the relation of member and society, but from that of mortgagor and mortgagee.

Action not brought *bonâ fide*.

Where a suit was commenced by a member on behalf of himself and the other members against the directors to restrain certain proceedings alleged to be *ultra vires*, and it appeared on the evidence that the plaintiff was a person of small means who had purchased one share for the purposes of the suit, which was really instituted by his solicitor to annoy two of the directors, Malins, V.-C., on motion ordered the bill to be taken off the file (*g*).

Where reference to arbitration is the proper remedy.

On the other hand, where a member withdrew from the society, and on the trustees refusing to pay him the value of his shares brought an action against them for the amount, it was held that arbitration was the proper remedy, and the Court had no jurisdiction (*h*); and the fact that a notice of withdrawal has been given and assented to by the trustees does not prevent the application of a rule providing for arbitration (*i*); the person who withdraws being treated as a member, for the purpose of arbitration, until his rights are determined (*j*).

(*g*) *Robson* v. *Dodds* (1869), 8 Eq. 301; 38 L. J. Ch. 647; 17 W. R. 782; 20 L. T. 968.

(*h*) *Ex parte Payne* (1849), 5 D. & L. 679; 18 L. J. Q. B. 197; 13 Jur. 634; *Crisp* v. *Bunbury* (1832), 8 Bing. 394; 1 M. & Sc. 646; *Timms* v. *Williams* (1842), 3 Q. B. 413; 11 L. J. Q. B. 210; *Huckle* v. *Wilson* (1877), 2 C. P. D. 410; 26 W. R. 98; *Johnson* v. *Altrincham Permanent Benefit Building Society* (1883), 49 L. T. 568; 48 J. P. 24.

(*i*) *Wright* v. *Deeley* (1866), 4 H. & C. 209; 30 J. P. 631; W. N. 74; *Huckle* v. *Wilson*.

(*j*) *Armitage* v. *Walker* (1855), 2 K. & J. p. 222; 2 Jur. N. S. 13; 26 L. T. (O. S.) 182; 20 J. P. 53, *per* Wood, V.-C.; *Walker* v. *General Mutual Building Society* (1887), 36 Ch. D. 777; 57

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Thompson v. Planet Benefit Building Society.

In *Thompson* v. *Planet Benefit Building Society*(*k*), a bill was filed by a shareholder against the society and its directors, alleging misconduct against the latter. The plaintiff prayed a declaration that he was not bound by certain new rules that had been passed, and he also prayed the benefit of certain of the original rules and for relief against the directors personally. The bill was demurred to both by the society and the directors, and after full argument it was held by Bacon, V.-C., that the dispute was one for the decision of which arbitrators were the proper authority, and the demurrers were allowed, but, in consideration of the state of the authorities, without costs. His Lordship declined to follow *Doubleday* v. *Hosking*, considering the weight of authority was against it; and he did not feel himself much bound by *Smith* v. *Lloyd*, being of opinion that that case had been decided by Lord Romilly under the erroneous idea that the 10 Geo. 4, c. 56, had been repealed.

Trott v. *Hughes.*

In *Trott* v. *Hughes* (*l*), a member who had given notice of withdrawal moved to restrain the directors from parting with the funds of the society, on the ground that he had a primary lien on them for the return of the subscriptions he had paid, and that he apprehended a misapplication of the funds by the directors. Lord Cranworth, V.-C., held that the Court of Chancery was not the proper forum for the decision

L. T. 574; 3 T. L. R. 847; 52 J. P. 278; *Davies* v. *Second Chatham Building Society* (1889), 61 L. T. 680; *Mitchells* v. *Caledonian Building Society* (1886), 13 Rettie, 918; 23 Sc. L. R. 651.

(*k*) (1873), 15 Eq. 333; 42 L. J. Ch. 364; 21 W. R. 474; 28 L. T. 549; 37 J. P. 468.

(*l*) (1850), 16 L. T. (O. S.) 260.

of such questions in face of a rule referring disputes to the directors, and if their decision was not satisfactory then to arbitration, and refused the motion with costs.

Reeves v. *White*.

In *Reeves* v. *White* (*m*), it was held that the trustees could not sue on covenants in a mortgage made by an advanced member to the society; but this is clearly not the law now; see *Mulkern* v. *Lord* and the other cases cited above.

"Person claiming on account of any member."

Another question that has arisen is as to who are to be included under the words "person claiming on account of any member." In *Kelsall* v. *Tyler* (*n*) the Court of Exchequer seem to have been clearly of opinion that the case of an executor of a deceased member did not fall within the language, "for he does not claim on account of the member, but on his own account." So in *Prentice* v. *London* (*o*) a transferee of shares, which the trustees insisted had been duly forfeited by them before notice of the transfer, was held not to be a person claiming on account of a member, but a person claiming on his own account.

Executor.

Transferee.

A person who has given notice to withdraw, however, but has not yet been paid, if not still a member (though this is the better opinion), is at any rate a person claiming on account of a member, because his sole claim is to receive back payments made by himself in the character of member (*p*).

Withdrawing member.

(*m*) (1852), 17 Q. B. 995; 21 L. J. Q. B. 169; 16 Jur. 637; 18 L. T. (O. S.) 271; 16 J. P. 118.

(*n*) (1856), 25 L. J. Ex. 153; 11 Ex. 513; 26 L. T. (O. S.) 226; 20 J. P. 150.

(*o*) (1875), L. R. 10 C. P. 679; 44 L. J. C. P. 353; 33 L. T. 251; 39 J. P. 711; and see *Symington's Exors.* v. *Galashiels Co-operative Store Co.* (1894), 21 Rettie, 371; 31 Sc. L. R. 253.

(*p*) *Per* Fry, L. J., *Walker* v. *General Mutual Building Society*

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Matured shares.

In a case that occurred in Victoria the rule was as follows:—"If any dispute arise between the society and any member or members of the society, or between any officer or member of the society or any other person claiming through or on account of a member and the directors on any matter, the same shall be referred to arbitration"; it was held that the rule did not apply to a holder of unpaid matured shares whose "connection with the society" had, under the rules, "ceased and determined" on the maturity of his shares (*q*).

Administrator.

Where the rules provided that on the death of a member his executors or administrators should be entitled to his shares and might vote and act as fully as the deceased member might have done if living, and the administrator of a deceased member acted and was treated by the society as the legal representative of the deceased, the Court held that the society were bound to treat him as a member for all purposes, and that a dispute which had arisen between them must be determined by arbitration (*r*).

Arbitration Act, 1889.

The provisions of the Arbitration Act, 1889, will apply to the reference except in so far as they are inconsistent with the above Acts or the rules or procedure recognized by them (*s*).

(1887), 36 Ch. D. p. 786; 57 L. T. 574; 52 J. P. 278; 3 T. L. R. 847; and see *Mackenzie* v. *Everton and West Derby Permanent Benefit Building Society* (1889), 61 L. T. 680.

(*q*) *Syme* v. *United Victoria Permanent Building Society* (1904), 29 V. L. R. 917.

(*r*) *Knox* v. *Shepherd* (1860), 2 L. T. 351.

(*s*) Arbitration Act, 1889, s. 24; and see *Re Knight and Tabernacle Permanent Building Society*, [1891] 2 Q. B. 63; 60 L. J. Q. B. 633; 39 W. R. 507; 64 L. T. 204; 65 L. T. 550; 7 T. L. R. 286; 55 J. P. 534, 544; affirmed in D. P., [1892] A. C. 298; 62 L. J. Q. B. 50; 41 W. R. 207; 67 L. T. 483; 56 J. P. 709; 8

The arbitrators must give notice of their intention to proceed with the reference. Where one of the rules of the society provided that all notices should be deemed duly served by posting the same to the members at their last registered address, the Court held that this only related to the ordinary business of the society, and did not apply to notices by arbitrators (*t*).

Notice must be given by arbitrators.

The arbitrators may decline to hear counsel (*u*), but they are bound to observe the rules of evidence (*v*).

When the arbitrator has made his award the Court has no power to alter it unless there is error on the face of it, or it is shown to have been corruptly obtained (*w*).

Award cannot be altered by the Court.

A justice is bound to issue his warrant to enforce the performance of the award when once made; he cannot decline to do so on the ground that there has been a misapplication of the funds of the society (*x*).

T. L. R. 616. This decision no longer applies to an incorporated society (see *ante*, p. 333), but appears to be still applicable if the society is unincorporated.

(*t*) *Hilton* v. *Hill* (1863), 9 L. T. 383; 27 J. P. 760.

(*u*) *Re Macqueen* (1861), 9 C. B. N. S. 793.

(*v*) *Re Enoch*, [1910] 1 K. B. 327; 79 L. J. K. B. 363; 101 L. T. 801 (C. A.).

(*w*) *Armitage* v. *Walker* (1855), 2 K. & J. 211; 2 Jur. N. S. 13; 26 L. T. (O. S.) 182; 20 J. P. 53.

(*x*) *Hughes* v. *Layton* (1864), 33 L. J. M. C. 89; 10 Jur. N. S. 513; *S. C., nom. R.* v. *D'Eyncourt*, 4 B. & S. 820; 9 L. T. 712; 28 J. P. 116; *S. C., nom. Hughes* v. *D'Eyncourt*, 3 N. R. 420; 12 W. R. 408.

CHAPTER X.

TERMINATION, DISSOLUTION, AND WINDING-UP.

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How a building society may come to an end.

THERE appear to be six different ways in which a building society may come to an end:—(1) Termination; (2) dissolution in manner prescribed by the rules; (3) dissolution under an instrument of dissolution; (4) dissolution by award of the registrar; (5) dissolution under sect. 26 of the Act of 10 Geo. 4, c. 56, assuming this section to be applicable to the case of a building society; (6) winding-up under the Companies (Consolidation) Act, 1908. Of these the first and last apply both to incorporated and unincorporated societies; the second, third, and fourth apply only to incorporated societies; the fifth applies (if at all) only to unincorporated societies. These modes of dissolution are alternative, and two of them cannot be employed at once. Thus, no instrument of dissolution can be registered while proceedings in Court are pending for winding-up. There appears to be no objection in point of law to an unincorporated society obtaining a certificate of incorporation for the mere purpose of being dissolved under the Act of 1874; see *ante*, p. 19.

Union or transfer.

Any incorporated society may also unite with or transfer its engagements to another incorporated society, and come to an end in this way; as to such a union or transfer, see *ante*, p. 86.

The manner in which any incorporated society,

whether terminating or permanent, is to be terminated or dissolved must be set forth in its rules (*a*). CHAP. X.

Termination.

1. The object of a terminating society is, as we have seen (*ante*, p. 3), to accumulate by the subscriptions of the members, and the interest derived from their investment, a fund sufficient to give a stipulated sum to each member, and then to divide the whole amongst them. The length of time required to accomplish this result varies according to the rate of subscription and the degree of success or non-success that attends the society's operations, but twelve or fourteen years may be taken as about the average period. When the agreed amount has been realized the accounts of the different members, some of whom will have received their shares in advance, are made up; the fund is divided amongst the members according to their several rights and interests, and the society is at an end. The rules in some cases provide that the society shall terminate on a given date, and the assets be then divided and the society dissolved (*b*), but this is not usual; it is more common for the rules to provide for the society continuing its operations until a certain amount per share has been realized.

In the case of an incorporated society the Act expressly provides that the society may terminate "upon the happening of any event declared by its rules to be the termination of the society" (*c*); and it defines a terminating society as one "which by its rules is to

(*a*) Building Societies Act, 1874, s. 16, sub-s. 14.
(*b*) See, for an instance, *Re Second Commercial Benefit Building Society* (1879), 48 L. J. Ch. 753.
(*c*) Building Societies Act, 1874, s. 32, sub-s. 1.

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terminate at a fixed date or when a result specified in its rules is attained" (*d*).

Dissolution in manner prescribed by the rules.

2. The Act of 1874 provides that an incorporated society may be dissolved in manner prescribed by its rules (*e*), and whatever course they point out for effecting the dissolution must be strictly pursued. The provisions of the Building Societies Acts will during the dissolution continue to apply in the case of the society as if the liquidators or other persons conducting the dissolution were the board of directors or committee of management of the society (*f*).

Notice to registrar.

Notice in duplicate, in a specified form, of the commencement and termination of the dissolution must be given within fourteen days to the registrar, who will return one copy of each notice to the society, endorsed with the word "Registered" and duly authenticated (*g*); and within twenty-eight days from the termination of the dissolution the persons conducting the dissolution must send to the registrar an account and

Accounts.

balance-sheet, signed and certified by them as correct, and showing the assets and liabilities of the society at the commencement of the dissolution, and the mode in which they have been applied and discharged, and in default of so doing will each be liable to a fine not exceeding five pounds for every day during which

Fee.

the default continues (*h*). A fee of two shillings and sixpence is payable for registering a notice of the commencement or termination of a dissolution (*i*).

(*d*) Building Societies Act, 1874, s. 5.
(*e*) *Ibid.* s. 32, sub-s. 2.
(*f*) Building Societies Act, 1894, s. 9.
(*g*) Building Society Regulations, 1895, rr. 26, 28.
(*h*) Building Societies Act, 1894, s. 11.
(*i*) Regulations, r. 41.

Advanced members cannot be required to pay up their balances except in accordance with the terms of their contracts (*k*). Advanced members.

3. The society, if incorporated, may be dissolved by instrument of dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument. The instrument of dissolution must set forth— Dissolution by instrument of dissolution.

(a) the liabilities and assets of the society in detail;
(b) the number of members, and the amount standing to their credit in the books of the society;
(c) the claims of depositors and other creditors, and the provision to be made for their payment;
(d) the intended appropriation or division of the funds and property of the society;
(e) the names of one or more persons to be appointed trustees for the special purpose, and their remuneration.

It must be registered in the manner provided for the registration of rules, and will be binding on all the members of the society (*l*). It need not be considered by a meeting (*m*). Registration.

An instrument of dissolution must be on foolscap paper in the Form T. given in the Regulations, and must be signed in duplicate and accompanied by a statutory declaration in the Form U.; and the registrar will return one of the duplicates to the society with a Form of instrument.

(*k*) Building Societies Act, 1894, s. 10.
(*l*) Building Societies Act, 1874, s. 32, sub-s. 3.
(*m*) *Botten* v. *City and Suburban Permanent Building Society*, [1895] 2 Ch. p. 448, *per* Stirling, J.

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certificate in the Form V. (*n*). The form of instrument, however, given in the Regulations is somewhat meagre, and generally requires (as the note to the form itself suggests) to be supplemented by the addition of other provisions adapted to the case of the particular society in question.

Signatures.

It will be noticed that the Act expressly requires that the consent of the members shall be "testified by their signatures to the instrument of dissolution;" it has been held in Scotland that these words must be construed strictly, and that signature by an agent of a member was not sufficient (*o*), but in England it seems that the consent may be signed by an agent (*p*). In the case of an agent, the signature should be "A. B. by C. D. his attorney" (*q*). Signatures by mark only must be attested by a witness who does not sign as a member. The signature of a member to one only of two duplicate instruments of dissolution is inoperative (*r*).

Joint shareholders.

For the purpose of consenting to a dissolution joint holders of a share are to be considered one member, and must all sign the instrument, but a member who holds

(*n*) Building Society Regulations, 1895, rr. 20, 21.

(*o*) *Second Edinburgh and Leith 493rd Starr-Bowkett Building Society* v. *Aitken* (1892), 29 Sc. L. R. 456.

(*p*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 44 W. R. 476; 74 L. T. 270; 12 T. L. R. 251; and see *Re Whitley* (1886), 32 Ch. D. 337; 55 L. J. Ch. 540; 34 W. R. 505; 54 L. T. 912, where signature by an agent of a memorandum of association was held sufficient; *Furnivall* v. *Hudson*, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 41 W. R. 358; 68 L. T. 378; 3 R. 230, where it was held that a bill of sale might be executed by attorney; *R.* v. *Justices of Kent* (1873), L. R. 8 Q. B. 305; 42 L. J. M. C. 113; 21 W. R. 635.

(*q*) *Re Whitley*, 32 Ch. D. p. 340, *per* Cotton, L. J.

(*r*) *Dennison* v. *Jeffs*, *supra*.

shares both jointly and severally need not sign in more than one place to testify consent in respect of all his shares (*s*).

Infants.

An infant member can consent to a dissolution of the society (*t*).

Withdrawing members to be reckoned in ascertaining majority.

Withdrawing members whose notices have expired but who have not been paid are still members, and must be taken into account in ascertaining the statutory majority required to sign an instrument of dissolution, even though the rules provide that members who have given such notice shall cease to take part in the affairs of the society; see *Sibun* v. *Pearce* (*u*). In that case the Court said:—"Then we come to this—which has also been very much relied on—'Members being thirteen weeks in arrear (unless out of employment or sick) or having given notice of withdrawal, shall, from the date of such notice, cease to take part in the affairs of the society.' But with respect to those persons who are in arrear, where a member is thirteen weeks in arrear, then, though there has been no expulsion and no forfeiture of his shares, he ceases to take any part in the affairs of the society; because, of course, if he were expelled, or his shares were forfeited, it would not be necessary to say that he shall no longer 'take part in the affairs of the society.' The same rule applies to those who have given notice of withdrawal, that they are not to take further part in the affairs of the society; and it has been said that this means that they are no

(*s*) *Ibid.*
(*t*) *Ibid.*
(*u*) (1890), 44 Ch. D. 354; 38 W. R. 658; 62 L. T. 388; 63 L. T. 123; 6 T. L. R. 262.

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longer continuing members. I say, No; it is necessary that they shall continue members; and this rule is not inconsistent with their doing so. Then it is said that if they continue members, this rule, which prevents them from taking part in the affairs of the society, prevents them from signing this deed, and therefore prevents the necessary majority being obtained. But, in my opinion, that is not the meaning, because to say, 'not take part in the affairs of the society,' must mean 'not take part in the affairs of the society as a continuing business;' it will not prevent their doing that which, in my view, the Act of Parliament requires them to do, if they accede to the dissolution, to show their assent by signing this deed. That, in my opinion, is not 'taking part in the affairs of the society' within the fair meaning of this rule, but doing something which the Act of Parliament requires to be done in order to get the dissolution in the event which has happened. Members who are thirteen weeks in arrear, or who have given notice of withdrawal, are not to take part in the affairs of the society in this sense, that they shall not have any voice as to how the affairs are to be conducted if it is a going concern; but, in my opinion, it is very reasonable that they should have a voice as to whether a dissolution shall take place in the particular way provided by this particular deed" (*v*).

Withdrawing members entitled to priority.

Withdrawing members whose notices of withdrawal have matured prior to the date of the instrument will be entitled, notwithstanding the dissolution, to be paid in priority according to the dates of their notices (*w*),

(*v*) *Per* Cotton, L. J., 44 Ch. D. p. 367.
(*w*) *Barnard* v. *Tomson*, [1894] 1 Ch. 374; 63 L. J. Ch. 488; 43 W. R. 2; 70 L. T. 306; 8 R. 585.

even though the instrument purports to cancel all such priorities (*x*).

Advanced members.

Advanced members cannot be required to pay up the balances owing on their securities otherwise than in accordance with their contracts (*y*).

Obligations of trustees during dissolution.

Pending the dissolution the provisions of the Building Societies Acts will continue to apply in the case of the society as if the trustees appointed under the instrument of dissolution were the board of directors or committee of management of the society (*z*). Annual statements in the ordinary prescribed form must accordingly continue to be made, and to the same date in each year, as before the dissolution commenced; if there is no secretary the statements should be countersigned by the liquidator or trustees in the dissolution.

Liability of trustee.

A person who accepts the trusteeship of an instrument of dissolution must be active in the discharge of his duties, and if he trusts blindly to his co-trustee, with the result that the trust funds are lost, he does not act "honestly and reasonably" so as to be entitled to be excused under the Judicial Trustees Act, 1896 (*a*), and will be ordered to pay the costs of an action for an account (*b*).

(*x*) *Botten* v. *City and Suburban Permanent Building Society*, [1895] 2 Ch. 441; 64 L. J. Ch. 609; 44 W. R. 12; 72 L. T. 722; 13 R. 591; 11 T. L. R. 418, not following *Kemp* v. *Wright*, [1894] 2 Ch. 462; 43 W. R. 21; 71 L. T. 650; 58 J. P. 588; 1 Manson, 308.

(*y*) Building Societies Act, 1894, s. 10; *Kemp* v. *Wright*, [1895] 1 Ch. 121; 64 L. J. Ch. 59; 43 W. R. 213; 71 L. T. 650; 59 J. P. 133, reversing on this point the decision below.

(*z*) Building Societies Act, 1894, s. 9.

(*a*) 59 & 60 Vict. c. 35, s. 3, sub-s. 1.

(*b*) *Re Second East Dulwich 745th Starr-Bowkett Building Society, Miall* v. *Pearce* (1899), 68 L. J. Ch. 196; 47 W. R. 408; 79 L. T. 726; 43 Sol. J. 206.

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Conveyance of legal estate by trustee under instrument of dissolution.

In a case that occurred in Scotland an instrument of dissolution appointed a trustee for the special purpose of dissolution, and empowered him (*inter alia*) "to sell by public or private sale the heritable subjects belonging to the society, to call up and receive payment of all sums due to the said society by bonds and dispositions in security and to exercise the powers of sale therein contained, to grant discharges thereof and dispositions following thereon, and generally all powers necessary for the realization and distribution of the assets competent to a trustee by the law of Scotland." On a sale by the trustee of property in mortgage to the society, the purchaser objected that he had no power to convey the legal estate, and the trustee accordingly presented a petition to the Court of Session for authority to convey without first completing a legal title in his own person. The Court held, however, that the trustee was in this dilemma: either he had, under the statute, a good title to convey already, in which case he did not need the assistance of the Court; or he had not a good title to convey, in which case the Court had no authority to give him one; and the application was therefore refused (*c*).

Dissolution not equivalent to voluntary winding-up.

It has been held in Victoria that proceedings to dissolve a building society under an instrument of dissolution are not equivalent to the voluntary winding-up of a company, and that a creditor who has obtained a judgment against a society which is in course of dissolution will not be restrained from enforcing his judgment by execution (*d*).

(*c*) *Re Campbell* (1890), 28 Sc. L. R. 147.
(*d*) *Browne* v. *Royal Permanent Building Society* (1892), 18 V. L. R. 397.

Alterations in instrument of dissolution.

Alterations, which will require to be registered (*e*), may be made in the instrument of dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the shares of the society, testified by their signatures (*f*); the alterations must be signed, declared to and certified in the same way as the original instrument (*g*).

Notice of termination of dissolution.

Notice in duplicate of the termination of the dissolution must be given to the registrar within fourteen days from such termination in the Form AC. in the Regulations, and he will return one copy to the society endorsed with the word "Registered," and duly authenticated (*h*).

Account and balance-sheet to be sent to registrar on dissolution.

The trustees under the instrument must within twenty-eight days from the termination of the dissolution send to the registrar an account and balance-sheet signed and certified by them as correct and showing the assets and liabilities of the society at the commencement of the dissolution and the mode in which those assets and liabilities have been applied and discharged, and in default of so doing will each be liable to a fine not exceeding five pounds for every day during which the default continues (*i*). A form of this account and balance-sheet has been settled by the registrar, and can be obtained on application to him.

Fees.

A fee of ten shillings is payable for the certificate of registry of an instrument of dissolution, or any alteration therein; and a fee of two shillings and six-

(*e*) Building Societies Act, 1874, s. 32, sub-s. 3.
(*f*) *Ibid.*
(*g*) Building Society Regulations, 1895, r. 22.
(*h*) Regulations, r. 28.
(*i*) Building Societies Act, 1894, s. 11.

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pence for registry of notice of the termination of the dissolution (*j*).

Dissolution by registrar.

4. As to a dissolution by award of the registrar, and the cases in which this method of putting an end to the society is available, see *ante*, p. 233.

Dissolution under 10 Geo. 4, c. 56, s. 26.

5. The old Friendly Societies Act of 1829 (*k*), s. 26, provided a means of dissolving a friendly society before its objects were attained, but only with the consent of five-sixths in value of the existing members testified in the manner pointed out by the section. Whether this provision is one of those that apply to unincorporated building societies (*l*) does not appear to have ever been expressly decided; see, however, *Re London and Metropolitan Counties Benefit Building and Investment Society* (*m*), cited *infra*, p. 378, where a similar provision was contained in the rules of the society.

Winding-up under the Companies Act.

6. The remaining method of putting an end to a building society is by winding-up under the Companies (Consolidation) Act, 1908. It will be convenient to consider incorporated and unincorporated societies separately.

1. As to Incorporated Societies.

Incorporated society may be wound up under supervision or compulsorily.

An incorporated society may be wound up either—

(a) voluntarily under the supervision of the Court;

or

(b) by the Court;

(*j*) Regulations, r. 41.
(*k*) 10 Geo. 4, c. 56.
(*l*) See 6 & 7 Will. 4, c. 32, s. 4.
(*m*) (1889), 1 Meg. 135; W. N. 18; 24 L. J. N. C. 23.

but in either case only (it would seem) on the petition of—

(1) a member authorized by three-fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the socitey; or

(2) a judgment creditor for not less than fifty pounds (*n*).

Voluntary winding-up under supervision.

If the society desires to wind up voluntarily under supervision, the proper course appears to be to pass either a special or an extraordinary resolution in accordance with sect. 69 of the Companies (Consolidation) Act, 1908, for the voluntary winding-up of the society and the appointment of liquidators, and also a resolution in accordance with sect. 32 (4) of the Building Societies Act, 1874, authorizing some member to persent a petition on behalf of the society for a supervision order, and the member thus authorized then petitions accordingly (*o*). As to a purely voluntary winding-up, see *post*, p. 371.

"Judgment creditor."

The words "judgment creditor" in sect. 32 (4) of the Building Societies Act, 1874, probably include an assignee of a judgment creditor (*p*).

(*n*) This appears to be the effect of the somewhat involved legislation on the subject: see Building Societies Act, 1874, s. 32 (4); Companies (Consolidation) Act, 1908, s. 131, in substitution for sect. 1 of the repealed Companies (Winding-up) Act, 1890; Building Societies Act, 1894, s. 8, which brought building societies within the Winding-up Act, 1890.

(*o*) See *Re Sunderland 32nd Universal Building Society* (1888), 21 Q. B. D. 349; 37 W. R. 95; Palmer's Company Precedents, Part II. (Winding-up), 11th ed. p. 813; *Re Ambition Investment Society*, [1896] 1 Ch. p. 93; *Portsea Island Building Society* v. *Barclay*, [1894] 3 Ch. p. 90; *London Provident Building Society* v. *Morgan*, [1893] 2 Q. B. 266.

(*p*) *Re The Premier Permanent Building Land and Investment Association* (1890), 16 Vict. L. R. 20.

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Consent judgment.

Where a judgment had been obtained by consent, but fairly and reasonably, in order to facilitate a winding-up, the Court refused to set it aside (*q*).

Where the society had ceased for some time to carry on business, and there were no directors, a compulsory order was made on a creditor's petition (*r*).

An order may be made to wind up a society, although its registration has been cancelled by the registrar (*s*).

To what Court petition must be presented.

Whether the Court having jurisdiction will be the High (or Palatine) Court, or the County Court, will depend on the amount standing to the credit of shares in respect of which no advance has been made. If the amount exceeds ten thousand pounds, the petition (whether for a winding-up or a supervision order) must be presented to the High Court, or in the case of a society within the jurisdiction of the Palatine Court of Lancaster or Durham, either to the High Court or the Palatine Court having jurisdiction. If the amount does not exceed ten thousand pounds, and the principal place of business of the society is situate within the jurisdiction of a County Court having jurisdiction under the Companies (Consolidation) Act, 1908, the petition must be presented to the County Court (*t*).

(*q*) *Hewitt* v. *Hull and Holderness Conservative Permanent Benefit Building Society* (1887), 4 T. L. R. 35 (C. A.).

(*r*) *Re Metropolis and Counties Permanent Investment Building Society*, Times, 23rd March, 1910; and see the cases cited *infra*, p. 376.

(*s*) *Re "Grosvenor" House Property Acquisition and Investment Building Society* (1902), 71 L. J. Ch. 748; 50 W. R. 630; W. N. 115; 113 L. T. J. 135.

(*t*) Companies (Consolidation) Act, 1908, s. 131, sub-ss. 1, 2, 3. The words of sub-ss. 2 and 3 are:—"Where the amount of the share capital of a company paid up or credited as paid up exceeds," &c., and it would seem that the item in a building society's accounts which most nearly corresponds to this is the amount paid

What County Courts have jurisdiction.

A list of the County Courts which have jurisdiction to wind up will be found in an Order dated May 19, 1899, amended June 16, 1899, made by the Lord Chancellor (*u*) under the Bankruptcy Act, 1883, and the Winding-up Act, 1890, from which it will be seen that the only County Courts which have winding-up jurisdiction are (a) the Courts specified in the second column of the First Schedule to the Order; and (b) certain other County Courts mentioned in a note at the end of the First Schedule thereto. To ascertain in what County Court district the principal place of business of the society is situate reference must be made to "The County Courts (Districts) Order in Council, 1899" (*v*), which divides the whole of the counties throughout England and Wales into the several Court districts specified in the Order.

Metropolitan County Courts and City of London Court.

In the case of the Metropolitan County Courts, their districts are for the purposes of jurisdiction in winding-up attached to the High Court (*w*), and this includes the City of London Court, which at the time

up on unadvanced shares. Under the Building Societies Act, 1874, s. 32, the County Court had exclusive jurisdiction, whatever the amount of the assets, and no order could be made by the High Court.

(*u*) The County Courts (Bankruptcy and Companies Winding-up) Jurisdiction Order, 1899. The order is officially numbered "No. $\frac{351}{L.\ 14}$ as amended by No. $\frac{433}{L.\ 21}$" and will be found printed in "Statutory Rules and Orders," 1903, Vol. 3, p. 78. By sect. 96 (4) of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), a County Court which at the commencement of the Act (January 1st, 1915) was excluded from jurisdiction and the districts then subsisting are respectively to be excluded and subsist until the Lord Chancellor otherwise orders.

(*v*) This order, as amended, is officially numbered "No. $\frac{178}{L.\ 3}$ *as amended*," and will be found printed in "Statutory Rules and Orders," 1903, Vol. 3, p. 1.

(*w*) *Re The Court Bureau* (No. 2) (1891), W. N. 15.

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Powers of Court exercising jurisdiction.

In exercising the jurisdiction to wind up, the County Court in England (*y*) has all the powers of the High Court (*z*), and no proceeding will be invalidated by reason of its being taken in a wrong Court (*a*).

Transfer of proceedings.

The winding-up or any proceedings therein may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one court to another court, or may be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced (*b*). The mode of transfer is regulated by rules 42—47 of the Companies (Winding-up) Rules, 1909, and an order to transfer the petition from the county court may be made by the judge of the High Court before any order has been made on the petition (*c*).

Petition presented to wrong Court.

Where a petition was wrongly presented to the High

(*x*) *Re Real Estates Co.*, [1893] 1 Ch. 398; 62 L. J. Ch. 213; 41 W. R. 157; 68 L. T. 24; 3 R. 192.

(*y*) As to Ireland, see *R.* (*McClean*) v. *Recorder of Londonderry*, [1911] 2 I. R. 553.

(*z*) Companies (Consolidation) Act, 1908, s. 131, sub-s. 6; *Re New Par Consols, Limited* (No. 2), [1898] 1 Q. B. 669; 67 L. J. Q. B. 598; 46 W. R. 369; 78 L. T. 312; 5 Manson, 277; County Court Rules, 1903, Ord. XLI. r. 12; and see also *Jones* v. *Swansea Cambrian Benefit Building Society* (1880), 29 W. R. 382; *S. C. nom. Andrew* v. *Swansea, &c. Society*, 50 L. J. Q. B. 428; 44 L. T. 106; 45 J. P. 507; *Re Portsea Island Building Society*, [1893] 3 Ch. 205; 62 L. J. Ch. 845; 41 W. R. 587; 69 L. T. 138; 3 R. 646; *Re Ferndale Industrial Society*, [1894] 1 Q. B. 828.

(*a*) Companies (Consolidation) Act, 1908, s. 131, sub-s. 7.

(*b*) *Ibid.* s. 133, sub-s. 1.

(*c*) *Re Laxon & Co.*, [1892] 3 Ch. 31; 40 W. R. 614; 67 L. T. 584; 8 T. L. R. 852.

Court the Court made the order, but transferred the further proceedings to the county court (*d*). CHAP. X.

If any question arises in any winding-up proceeding in a county court which all the parties to the proceeding, or which one of them and the judge of the court, may desire to have determined in the first instance in the High Court, the judge must state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required, will be transmitted to the High Court for the purposes of the determination (*e*). Special case.

Every joint-stock company must have a registered office, and for the purposes of sect. 131 of the Act of 1908 "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding-up (*f*). A building society has no 'registered office,' but it has a "chief office or place of meeting for the business of the society" (*g*), which would no doubt be held to be its 'registered office' for the purposes of the above provision. "Registered office."

By sect. 137 (2), where a company is being wound up voluntarily or subject to supervision in England, a petition may be presented by the official receiver as well as by any other person authorized in that behalf under the other provisions of the section, but no wind- Petition by official liquidator.

(*d*) *Re Rugeley Gas Co.* (1899), W. N. 127, Wright, J.; and see *Re Birkenhead Benefit Building Society* (1872), 26 L. T. 281, Bacon, V.-C., where the transfer was made because the assets were very small.

(*e*) Companies (Consolidation) Act, 1908, s. 133, sub-s. 3.

(*f*) *Ibid.* sub-s. 8.

(*g*) Building Societies Act, 1874, s. 16 (1).

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ing-up order may be made on the petition unless the court is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories (*h*).

The Act contains an important provision with reference to the officers, the effect of which is as follows:—

Power of Court to assess damages against delinquent directors and officers.

Where in the course of a winding-up it appears that any person who has taken part in the formation or promotion of the society, or any past or present director, manager, liquidator, or any officer of the society, has misapplied or retained or become liable or accountable for any money or property of the society, or been guilty of any misfeasance or breach of trust in relation to the society, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property, or any part thereof respectively, with interest at such rate as the court thinks just, or to contribute such sum to the assets of the society by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just; and this provision applies notwithstanding that the offence is one for which the offender may be criminally responsible (*i*).

Summons must state grounds of complaint.

A summons under the section should state the grounds on which it is suggested that the matters com-

(*h*) Companies (Consolidation) Act, 1908, s. 137 (2).

(*i*) *Ibid.* sect. 215, sub-ss. 1, 2, replacing sect. 10 of the Winding-up Act, 1890, to the like effect.

plained of constitute a wrongful act or misfeasance for which the officer is responsible. Where the alleged misfeasance consists of an act which is not *ultra vires* the society, and not fraudulent or dishonest, directors will not be liable, unless it can be shown that they did not really exercise their discretion and judgment as such directors, and that the omission to do so resulted in loss or damage to the society (*j*).

"Any officer." Auditor.

Any person who is appointed to the office of auditor and acts in that office will be an "officer" within the section, and may be made liable accordingly; but the mere performance of auditor's work upon a given occasion by a person who has never been appointed to the office of auditor does not make him an "officer" so as to render him liable under the section (*k*). "An auditor," said Lindley, L. J., "may or may not be an officer of a company. So may anybody else, *e.g.*, a banker or solicitor. *Primâ facie* such persons are not officers. See as to bankers, *In re Imperial Land Co. of Marseilles* (*l*); as to solicitors, *Carter's Case* (*m*). But if appointed to an office under the company, and if they act in that office as officers of the company, they will be officers within sect. 10. That was decided in the case of *In re Liberator Permanent Benefit*

(*j*) *Re New Mashonaland Exploration Company*, [1892] 3 Ch. 577; 61 L. J. Ch. 617; 41 W. R. 75; 67 L. T. 90. See also as to this section, *Re Geo. Newman & Co.*, [1895] 1 Ch. 674; 43 W. R. 483.

(*k*) *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617; 66 L. J. Ch. 354; 45 W. R. 418; 76 L. T. 239; and see further as to auditors, *Re London and General Bank* (No. 2) and *Re Kingston Cotton Mill Co.* (No. 2), cited *ante*, p. 187.

(*l*) (1870), 10 Eq. 298.

(*m*) (1886), 31 Ch. D. 496.

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Building Society (*n*), and no irregularity in their appointment would, I conceive, avail them" (*o*).

Solicitor.

Where a solicitor transacted all the legal business of the society at a fixed salary, out of which he paid his clerks and office expenses, and paid over to the society all costs which he received from members, and acted moreover as financial manager to the society, he was held liable as an "officer" under the section (*p*).

Order for payment is a "final judgment."

An order for payment of money under the above section is, in England, a final judgment within sect. 4, sub-sect. 1, par. (g) of the Bankruptcy Act, 1883 (*q*).

Transfer of shares pending winding-up.

In the case of a sale and transfer of shares in a society after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the Court; the Court has power to order the rectification of the register of members by the insertion of such transferee's name, but the exercise of the power is discretionary, and such an order ought not to be made except on strong grounds (*r*).

Notice to registrar.

Notice of the commencement of the winding-up must be given to the registrar in duplicate, within fourteen days from the date of an order for winding-up subject to the supervision of the Court, or of an order for winding-up by the Court, as the case may be, in the

(*n*) 71 L. T. 406.
(*o*) [1897] 1 Ch. p. 627.
(*p*) *Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406.
(*q*) Companies (Consolidation) Act, 1908, s. 215 (3); the corresponding provision of the Bankruptcy Act, 1914, is s. 1, sub-s. 1, para. g.
(*r*) *Re Onward Building Society*, [1891] 2 Q. B. 463; 60 L. J. Q. B. 752; 39 W. R. 718; 40 W. R. 26; 65 L. T. 516; 7 T. L. R. 601; 56 J. P. 260.

Form A B annexed to the Regulations, and the registrar will return one copy to the society, indorsed with the word "Registered," and duly authenticated (*s*).

Scotland.

In Scotland the court having jurisdiction is the Sheriff's Court of the county in which the chief office or place of meeting for the business of the society is situate (*t*), and proceedings in the liquidation are regulated by the Act of Sederunt of March 17th, 1882.

Ireland.

In Ireland the court having jurisdiction is the Civil Bill Court, within the jurisdiction of which the society's office or place of meeting is situate (*u*), and that court has the same powers as the High Court (*v*).

Voluntary winding-up.

Whether an incorporated building society can wind up altogether voluntarily under the Companies Act—*i.e.*, can pass an effectual resolution for voluntary winding-up without going on to apply for a supervision order—is not altogether clear. It depends upon the effect to be attributed to sect. 32 of the Building Societies Act, 1874, and sect. 8 of the Building Societies Act, 1894. There does not appear to be any reported decision on the point, but the better opinion seems to be that a society can be so wound up, though there are certainly some logical difficulties in the way of so holding (*w*). The point is not of any very great importance, for in practice a building society which

(*s*) Building Societies Act, 1874, s. 32, sub-s. 4; Building Society Regulations, 1895, r. 27.
(*t*) Building Societies Act, 1874, s. 4.
(*u*) *Ibid.*
(*v*) See *R.* (*McClean*) v. *Recorder of Londonderry*, [1911] 2 I. R. 553.
(*w*) See Buckley on the Companies Acts, 9th ed. p. 313, where the learned author says that it seems to be now "reasonably clear" that a building society may wind up voluntarily.

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desires to wind up its affairs without the assistance of the Court always has recourse to an instrument of dissolution.

2. As to Unincorporated Societies.

Unincorporated society may be wound up compulsorily.

If the society is unincorporated and consists of more than seven members it may be wound up compulsorily (but not voluntarily or subject to supervision) under the Companies (Consolidation) Act, 1908, as an "unregistered company" (*x*).

Contributories.

Every person will be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the society, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of the winding-up, and every contributory will be liable to contribute to the assets of the society all sums due from him in respect of his liability. In the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female contributory, the provisions of the Act with respect to the personal representatives, heirs, and devisees of deceased

(*x*) Companies (Consolidation) Act, 1908, Part VIII. ss. 267—273; *Sinclair* v. *Brougham*, [1914] A. C. 398, cited *post*, p. 425; *Re No.* 3 *Midland Counties Benefit Building Society* (1864), 4 De G. J. & S. 468; 33 L. J. Ch. 739; 11 Jur. N. S. 229; 13 W. R. 399; 4 N. R. 536; 29 J. P. 613, reversing the decision below, 33 L. J. Ch. 520; 10 Jur. N. S. 505; 10 L. T. 258; 28 J. P. 295; *Re Doncaster Permanent Building Society* (1866), 3 Eq. 158; 15 W. R. 102; 15 L. T. 270; 31 J. P. 310; *Re Cilfoden Benefit Building Society* (1868), 3 Ch. 462; *Re Queen's Benefit Building Society* (1871), 6 Ch. 815; 40 L. J. Ch. 381; 19 W. R. 597; 24 L. T. 346; *Re Professional, &c. Building Society* (1871), 6 Ch. 856; 19 W. R. 1153; 25 L. T. 397; *Re Premier, &c. Society* (1890), 16 V. L. R. 424; *Re Bundaberg Permanent Building and Investment Society* (1898), 9 Queensland L. J. Rep. 51.

contributories, to the trustees of bankrupt or insolvent contributories, and to the liabilities of husbands and wives respectively, will apply (*y*).

In a case that occurred in Queensland the shares were of the ultimate value of 25*l*., in respect of each of which a subscription of 5*s*. a month was to be paid. As soon as the subscriptions on a share, with the addition of profits, amounted to 25*l*., the holder was entitled to receive that sum. Any unadvanced member might also withdraw, and was then to receive back his contributions, less certain deductions, with interest. It was held that members whose contributions, with accumulated profits, had before the winding-up amounted to 25*l*. a share, though they had not received that sum from the society, and members who had complied with the conditions entitling them to withdraw but had not yet received payment, were not liable to be placed on the list of contributories (*z*). In this case the society had not been registered under the local Building Societies Act, and there was consequently no statutory limitation of the liability of the members; they were therefore practically in the same position as members of an unincorporated society in this country.

Vesting orders.

If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the winding-up order, or by any subsequent order, direct that all or any part of the property, real and personal (including things in action), belonging to the company, or to

(*y*) Companies (Consolidation) Act, 1908, s. 269.
(*z*) *Re Bundaberg Permanent Building and Investment Society (No.* 1) (1898), 9 Queensland L. J. Rep. 77, Griffith, C. J.

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trustees on its behalf, is to vest in the liquidator by his official name, and thereupon the property or the part thereof specified in the order will vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any action or other legal proceeding relating to that property necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property (*a*).

Provisions of Part VIII. cumulative.

The provisions of Part VIII. of the Act with respect to unregistered companies are in addition to and not in restriction of any provisions thereinbefore contained with respect to winding up companies by the Court, and the Court or liquidator may, in addition to anything contained in Part VIII., exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under the Act; but an unregistered company will not, except in the event of its being wound up, be deemed to be a company under the Act, and then only to the extent provided by Part VIII. (*b*).

Where number of members is below seven.

Sect. 267 of the Act only applies where the society consists of more than seven members. Where the society consisted of only five members at the date of the petition, though there had formerly been many more, Romilly, M. R., held that there was jurisdiction to make an order to wind up (*c*). In another case, however, Jessel, M. R., held that no order could be

(*a*) Companies (Consolidation) Act, 1908, s. 272. See *post*, p. 430, as to this section.

(*b*) *Ibid.* s. 273.

(*c*) *Re National Permanent Benefit Building Society* (1867), W. N. 225.

made unless there were seven members at the date when the petition was presented, and he ordered the petition to stand over for an action to be commenced as in the case of a partnership; and the society was ultimately wound up in this way (*d*). The word "members," however, in the section is not limited to persons whose names are actually on the register, but includes also persons whose names ought to have been there, *i.e.*, could have been placed there against their will; but it does not include past members or representatives of deceased or bankrupt members (*e*). An order to wind up made when the number of members was below seven, though possibly binding on the members, is of no validity against strangers (*f*).

Unauthorized society.

A society established and registered in 1868, under the Act of 1836, which has omitted to obtain a certificate of incorporation under the Act of 1874, cannot, it would seem, be wound up under the Companies Act, the words "formed in pursuance of some other Act of Parliament," in sect. 1 (1) of the Act of 1908, probably meaning formed *and having its existence recognized by* some other Act of Parliament (*g*). In Scotland, however, the contrary has been held; see *Smith's Trustees* v. *Irvine and Fullarton Property Investment and Building Society* (*h*). In that case the society had

(*d*) *Re Bolton Benefit Loan Society* (1879), 12 Ch. D. 679; 49 L. J. Ch. 39; 28 W. R. 164.

(*e*) *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663; 43 W. R. 216; 39 Sol. J. 345; 72 L. T. 18, 411; *Re South London Fish Market Co.* (1888), 39 Ch. D. 324; 37 W. R. 3; 60 L. T. 68.

(*f*) *Re Bowling & Welby's Contract.*

(*g*) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102; 70 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44; 49 W. R. Dig. 18.

(*h*) (1903), 6 Fraser, 99; 41 Sc. L. R. 66.

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been established in 1873 under the Building Societies Act of 1836, and never incorporated. A creditor presented a petition for winding-up and the Court made the order, holding that the society having been properly formed in the first instance did not fall within the class of companies forbidden by sect. 4 of the Companies Act, 1862 (*i*), and that in virtue of sect. 38 of the Interpretation Act, 1889 (*j*), the repeal of the Act of 1836 by the Act of 1894 did not affect rights or liabilities acquired or incurred by the society under the repealed Act.

To what Court petition presented.

The Court to which the petition should be presented will depend on the amount paid up on unadvanced shares. See *ante*, p. 364.

Who may apply for a winding-up order.

An order to wind up may be made at the instance of an outside creditor (*k*), of an unadvanced member who has given notice of withdrawal (*l*), or of an advanced member (*m*). But though an outside creditor is, except under special circumstances, entitled to a winding-up order *ex debito justitiæ*, there is no such absolute right in the case of a member; the Court has a discretion, and if it sees that an order to wind up will be prejudicial to the best interests of the society,

(*i*) See now Companies (Consolidation) Act, 1908, s. 1 (1).

(*j*) 52 & 53 Vict. c. 63.

(*k*) *Re No. 3 Midland Counties Benefit Building Society* (1864), 4 De G. J. & S. 468; 33 L. J. Ch. 739; 11 Jur. N. S. 229; 13 W. R. 399; 4 N. R. 536; 29 J. P. 613; reversing the decision below, 33 L. J. Ch. 520; 10 Jur. N. S. 505; 10 L. T. 258; 28 J. P. 295; *Re Bundaberg Permanent Building and Investment Society* (1898), 9 Queensland L. J. Rep. 51.

(*l*) *Re Queen's Benefit Building Society* (1871), 6 Ch. 815; 40 L. J. Ch. 381; 19 W. R. 597; 24 L. T. 346; *Ex parte Morton*, [1895] 1 Ir. R. 1.

(*m*) *Re Professional, Commercial, and Industrial Benefit Building Society* (1871), 6 Ch. 856; 19 W. R. 1153; 25 L. T. 397.

and in fact will do more harm than good, or is sought for the purpose of obtaining an undue advantage over other members, the petition will be dismissed (*n*). So the order will be refused where the petitioner has no substantial interest in a winding-up order being made (*o*), or where the cost would be out of all proportion to the assets of the society, and the petitioner's object can be attained in another way (*p*). In a later case a petition was presented against the society, but was withdrawn, all the creditors, except one depositor, who did not appear on the petition, agreeing to accept 12*s*. 6*d*. in the pound, and this sum was paid to them. There was nothing for distribution among the shareholders, as the assets did not realize enough to pay the composition, and the balance was provided by the officers, who took an assignment of the claims of the assenting creditors, and retained in hand enough to pay and offered the depositor 12*s*. 6*d*. in the pound on his debt. This offer he refused, and presented a petition alleging irregularities by the society's officers, and that an investigation into its affairs was necessary. The Court was of opinion that nothing substantial would result from a winding-up order, and that under the circumstances the petition must be dismissed; but as

Society which has failed to obtain incorporation.

(*n*) *Re Professional, Commercial, and Industrial Benefit Building Society, ante; Re Planet Benefit Building and Investment Society* (1872), 14 Eq. 441; 41 L. J. Ch. 738; 20 W. R. 935; 27 L. T. 638; *Martin* v. *Scottish Savings Investment and Building Society* (1879), 17 Sc. L. R. 221; *Re Tyneside Permanent Building Society* (1885), 20 L. J. N. C. 130, where, however, under the circumstances, the dismissal was without costs.

(*o*) *Re London Permanent Benefit Building Society* (1869), 17 W. R. 513, 717; 20 L. T. 388; 21 L. T. 8; W. N. 51.

(*p*) *Re Second Commercial Benefit Building Society* (1879), 48 L. J. Ch. 753.

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the society was one which had omitted to obtain a certificate of incorporation, and resisted the petition on the ground that it was a non-existent society for the purposes of winding-up, the dismissal was without costs (*q*).

Loan *ultra vires*.

Where the petitioner had lent money to a society which had no power to borrow, so that the loan in fact created no debt, the petition was dismissed (*qq*).

Petition by unadvanced member.

In one case a petition was presented by an unadvanced member whose shares were not fully paid up. The society was solvent, so far as its creditors were concerned, though there were not funds sufficient for payment of what was due to members. The 20th rule was as follows:—"No dissolution of this society shall take place unless its affairs be deranged, or its principles prove inadequate to promote its objects, or its funds be insufficient to meet the claims upon them, or from any other cause rendering the dissolution absolutely necessary, and then only in pursuance of the provisions of the Act 10 Geo. 4, c. 56, s. 26; and any member in any way attempting to promote a dissolution of the society, but for the causes before named, shall forfeit all his moneys, benefit, and interest therein, and be forthwith expelled the same."

It appeared that the petitioner had made no attempt to comply with this rule, that the petition was not supported by anyone else, and that meetings of

(*q*) *Re Ilfracombe Permanent Mutual Benefit Building Society, ubi sup.*

(*qq*) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. 309; 18 W. R. 388; 22 L. T. 284; 34 J. P. 341. This was a very strong case—the winding-up order had been made two years previously, and the question arose on an order for a call.

depositors and shareholders had both expressed the opinion that a winding-up would be against the interests of the depositors, and disastrous to the shareholders. Under these circumstances the learned judge (North, J.) held that though he clearly had jurisdiction, under the Act of 1862, to make a winding-up order, it was not a case in which it would be "just and equitable" to exercise it, and he accordingly dismissed the petition with costs (*r*).

Withdrawals suspended.

In another case an industrial society had under a rule suspended the power of withdrawal for about two years, and three shareholders petitioned for a winding-up. There were no outside creditors, and the majority of shareholders opposed the winding-up. Under these circumstances, and as it was not shown that it was impossible to carry on business, a winding-up order was refused (*rr*).

General principles of winding-up in the case of a building society.

It is beyond the scope of the present work to enter into the general law and practice of winding-up, which will be found in treatises that are in the hands of every practitioner. It must suffice here to notice those points which are peculiar to the winding-up of building societies, or are of special importance in relation to them, and to attempt to point out the general principles on which the liquidation of such a society proceeds. These principles may, it is conceived, be summarized as follows, though so much depends in each case on the

(*r*) *Re London and Metropolitan Counties Benefit Building and Investment Society* (1889), 1 Meg. 135; W. N. 18; 24 L. J. N. C. 23.

(*rr*) *Re Horsham Industrial Society* (1894), 58 J. P. 639; 70 L. T. 801.

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Building society not a company or partnership.

1. A building society, though it may be wound up under the Companies Act, is neither a joint-stock company, nor a common law partnership. It is an association of a special kind, formed and regulated under particular Acts of Parliament for special purposes, and the rights and liabilities of the members are to be determined by the particular contract into which they have entered, and which is to be found in the rules of the society.

Investing members.

2. Unadvanced or investing members are only liable, as between the different classes of members themselves, to contribute to the assets of the society to the extent (if any) to which the payments due in respect of their shares are in arrear at the commencement of the winding-up. If, however, the society is unincorporated, they will be liable to ordinary creditors without limitation of liability, and to loan creditors to the extent of the amounts payable by the unadvanced members under the rules, and they may in some cases be under special liability to preference shareholders.

Advanced members.

3. In the absence of special contract, advanced members of a permanent society are entitled to redeem, and so put an end to their connection with the society, by paying up the balances remaining owing on their securities, and are not bound to remain members for the purpose of

bearing a share of any losses that may have been sustained by the society. If the society is unincorporated and there are outside creditors the liability is more extensive.

Deceased members.

4. Representatives of deceased members are entitled to be paid out of the assets in priority to other members, including even those who have given notice to withdraw.

Withdrawing members.

5. Members who have given notices to withdraw, which have matured before the commencement of the winding-up, and members whose shares are realized or completed at the commencement of the winding-up, will be entitled to be paid out of the assets, after satisfaction of the outside creditors, in priority to members who have not given such notice or whose shares are not realized or completed.

Surplus assets.

6. After payment of debts and making due provision for priorities of withdrawn and realized or completed shares, the surplus assets are divisible among the unadvanced members according to the interests which existed at the commencement of the winding-up.

The foregoing rules apply, generally speaking, both to incorporated and unincorporated societies; but in determining the liability of members of incorporated societies, the provisions of sect. 14 of the Act of 1874 must, of course, be borne in mind; see as to this section, *ante*, p. 213.

Forfeited shares.

In one case a member whose shares had been forfeited was placed on a list of contributories (*s*).

(*s*) *Re St. George's Permanent Building Society* (1858), 6 W. R. 766, Kindersley, V.-C.

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Representative case.

Questions arising in the winding-up of a building society are sometimes decided by representative parties being brought before the Court; the costs in a representative case are generally allowed out of the assets, but only as between party and party—not as between solicitor and client (*t*).

Company in the nature of a building society.

For an instance of the mode of distributing the assets of an unlimited company partaking to some extent of the nature of a building society, see *Re Land Building Government and Guaranteed Securities Society* (*u*), where the articles of association were of a very special character.

Building society is not a company or partnership.

1. The authority for this first proposition will be found in the cases of *Brownlie* v. *Russell* (*v*); *Auld* v. *Glasgow Working Men's Building Society* (*w*); and *Tosh* v. *North British Building Society* (*x*); in the two former cases, the society was incorporated; in the last, it was unincorporated. In his judgment in *Brownlie* v. *Russell* (*y*), the Earl of Selborne, L. C., thus expressed himself: "This is not a joint stock company; still less is it a common law partnership; but it is a society of a special kind, formed and regulated

(*t*) *Re Mutual Society, Grimwade* v. *Mutual Society* (1881), 18 Ch. D. 530; 50 L. J. Ch. 400.

(*u*) (1882), 46 L. T. 758, Fry, J.

(*v*) (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757; 10 Rettie (H. L.) 19; 20 Sc. L. R. 481; affirming with a variation the decision below, 8 Rettie, 917; 18 Sc. L. R. 661.

(*w*) (1887), 12 App. Cas. 197; 35 W. R. 632; 56 L. T. 776; 14 Rettie (H. L.) 27; 24 Sc. L. R. 486; 3 T. L. R. 78; reversing the decision below, 12 Rettie, 1320; 22 Sc. L. R. 883.

(*x*) (1886), 11 App. Cas. 489; 35 W. R. 413; 14 Rettie, 6; 24 Sc. L. R. 128; reversing on this point *S. C.* below, *nom. Trustees of the North British Building Society*, 12 Rettie, 1271; 22 Sc. L. R. 833.

(*y*) 8 App. Cas. p. 248.

under particular Acts of Parliament for special purposes. A fallacy, which has pervaded much of the argument that has been offered to your Lordship in support of the appeal, is that, because the members of this society are associated together for a common purpose, therefore there must, in equity and in reason, and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual state of things they may suffer. It appears to me that such a result cannot be arrived at by presumptions or inferences from the law relating to companies of a different kind, but that we must look at this particular contract."

Partnership Act, 1890.

The Partnership Act, 1890 (*z*), it may be observed, expressly provides that the relation between members of any company or association which is (a) registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the incorporation of joint stock companies, or (b) formed or incorporated by or in pursuance of any other Act of Parliament, shall not be a partnership within the meaning of the Partnership Act.

Liability of unadvanced members.

2. That the liability of unadvanced or investing members is, in ordinary cases, limited as above stated is shown by the cases of *Brownlie* v. *Russell*, *Tosh* v. *North British Building Society*, and *Re Middlesbrough, Redcar, and Saltburn, &c. Building Society* (*a*). In

(*z*) 53 & 54 Vict. c. 39, s. 1, sub-s. 2.

(*a*) (1889), 58 L. J. Ch. 771; 5 T. L. R. 516. There was a provision in the rules of this society to the effect that every

CHAP. X. his judgment in the last-named case, where the society was unincorporated, the learned judge, Stirling, J., after referring to *Brownlie's* and *Tosh's Cases*, where the societies were incorporated, said (p. 778):—"It seems to me, therefore, that the effect of those decisions is this: that where a compulsory winding-up supervenes, a line is to be drawn at the date of the winding-up, and that thereupon—as it is put by Lord Watson—the liability of the shareholders is put an end to so far as regards all liability beyond the amount which he was bound to contribute up to that date." . . . "Now what is the position of the unadvanced shareholder? I take it to be exactly that which is laid down by Lord Watson. He is free from all liability beyond the amount which he was bound to contribute up to that date. That agrees precisely with rule 32 when you apply it to the case, not of a decision *modo et formâ* as contemplated by that rule, but to the case of a compulsory winding-up which supervenes and puts an end to the whole thing." . . . "Therefore, the unadvanced members who are in arrear must, in the first place, pay up or bring into account all that they were bound to pay up to the commencement of the winding-up, and after doing that they will take a share in the stock of the society *pari passu* with the other unadvanced members in proportion to their interest in the society."

Unincorporated society

If, however, the society is unincorporated, and there are outside creditors whose claims have to be met, the

member who obtained an advance should continue to hold at least one unadvanced share in the society, and that repayments should be first applied in keeping on foot the unadvanced shares; such a provision, it is believed, is unusual.

with outside creditors.

liability is more extensive. In such a case all the members, whether investing or advanced, are personally liable, without limitation, for the ordinary debts of the society incurred while they are members, the liability depending on the doctrine of principal and agent; and they are also liable for loans to the extent of the amounts payable by them under the rules, but no further; see *Re West London and General Permanent Benefit Building Society* (*b*). In that case the assets of the society, when it was ordered to be wound up, were sufficient to pay the ordinary creditors, but not the depositors also, in full; and it was held (1) that the actual costs of realizing the properties as they existed at the commencement of the winding-up must first be paid out of the assets as they then existed, and that the rest of such assets must be applied in paying ordinary debts and loans on deposits, *pro ratâ;* (2) that to meet the estimated costs of winding-up (other than costs of realization) a call must be made on all the members, both advanced and unadvanced, in proportion to their shares; (3) that the deficiency due to the ordinary creditors must also be met by calls on all the members; but (4) that neither advanced nor unadvanced members were liable to contribute, beyond the amounts

(*b*) [1894] 2 Ch. 352; 63 L. J. Ch. 506; 42 W. R. 535; 70 L. T. 796; 8 R. 764; 10 T. L. R. 280, Wright, J.; and see also as to the liability of members of an unincorporated society, *Re Doncaster Permanent Building Society* (1866), 3 Eq. 158; 15 W. R. 102; 15 L. T. 270; 31 J. P. 210; *Re Professional, Commercial, and Industrial Benefit Building Society* (1871), 6 Ch. 856; 19 W. R. 1153; 25 L. T. 397; Lord Blackburn's judgment in *Murray* v. *Scott* (1884), 9 App. Cas. p. 545; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462; and the judgment of Griffith, C. J., in *Re The Bundaberg Permanent Building and Investment Society* (No. 1) (1898), 9 Queensland L. J. Rep. pp. 79 *et seq.*

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payable on their shares under the society's rules and tables, to pay the deficiency due to the depositors; and (5) that the advanced members were entitled to redeem on paying these calls and the amounts due under their securities and the rules and tables of the society.

Preference shareholders.

Ordinary members (whether advanced or unadvanced) may also, if the rules so provide, be liable to make good the amount owing to preference shareholders. In one case, where the society was unincorporated, the words of the material rules were:—"Members holding preference shares shall not in respect thereof be liable to contribute to the expenses or losses of the society, nor shall they participate in the profits thereof, hold office or vote;" and advances on shares were to be repaid by fixed instalments, together with "a proportion of all expenses, losses and other charges against the society (if any)." It was argued that though preference shareholders were clearly not to pay anything towards losses or expenses they were not exempted from suffering losses, but it was held that the contribution spoken of meant "by way of payment or of deduction," for those shareholders who had paid their money and did not get it all repaid would be in fact contributing, and that the loss must be borne by the advanced and unadvanced members in fair proportions (*c*).

Deposit or paid-up shares.

In *Re Guardian Permanent Benefit Building Society, Scott's Case* (*d*), it was held that a rule giving the directors of an unincorporated society power to issue

(*c*) *Re Reliance Permanent Benefit Building Society* (1892), 61 L. J. Ch. 453; 66 L. T. 823; W. N. 77; 8 T. L. R. 525, Chitty, J.

(*d*) (1883), 23 Ch. D. 440, 453; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134; affirmed on appeal, *nom. Murray* v. *Scott*, 9 App. Cas. 519; 53 L. J. Ch. 745; 33 W. R. 173; 51 L. T. 462.

deposit or paid-up shares at a fixed rate of interest, upon a certificate entitling the depositor (after one month's notice in writing) to withdraw the whole or part of his deposit in preference to all other shares, was valid, and that the holders, whether they had given notice or not, were entitled in a winding-up to be paid in priority to the unadvanced members.

Preference shares.

In *Sixth West Kent Mutual Building Society* v. *Shove* (*e*), on the other hand, preference shares were issued on the terms that each share was to bear interest (in lieu of bonus and other periodical profits) at a fixed rate, and might be withdrawn or paid off on three months' notice on either side, and that in the event of notice being given by the shareholder the share should be paid out of the funds of the society along with the other preference shares in order of priority of notice. It was held that the holders of these shares were entitled to priority over the ordinary members as regards the right to interest and the right of withdrawal, but were not entitled in the distribution of the society's assets to priority as regards payment of capital except in the cases in which notice of withdrawal had actually been given.

Past investing members.

An investing member who has withdrawn, and been paid the amount of his shares, before the commencement of the winding-up is not liable to be placed on the list of contributories, whether the society is incorporated (*f*) or unincorporated (*g*).

(*e*) [1899] 2 Ch. 64, n.
(*f*) *Re Sheffield and South Yorkshire Building Society* (1889), 22 Q. B. D. 470; 58 L. J. Q. B. 265; 60 L. T. 186; 5 T. L. R. 192; 53 J. P. 375.
(*g*) *Re West Riding of Yorkshire Permanent Benefit Building*

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Incorporated societies.

In an incorporated society the liability of an investing or unadvanced member is expressly limited to "the amount actually paid or in arrear" on his shares: see sect. 14 of the Act of 1874, *ante*, p. 213, and the cases there cited.

Liability of advanced members. *Brownlie* v. *Russell*.

3. The leading authority as to the position of advanced members in the event of a winding-up is *Brownlie* v. *Russell* (*h*), where the society was incorporated. In that case an advanced member claimed to redeem on payment of the difference between his loan and the total amount of the instalments which he had already repaid. The liquidators denied his right to redeem after the winding-up had commenced unless he paid up the whole loan, leaving the instalments to be refunded according to the result of the liquidation. The House of Lords held that the advance had been extinguished *pro tanto* by the total amount of the instalments paid, and that after the date of the winding-up order, although an advanced member could no longer take advantage of a rule enabling him to withdraw, he was nevertheless entitled to redeem on payment of the difference between the advance and the instalments, with interest added thereon, as against excess of interest which he had been charged, and on payment of such difference with interest was entitled to be relieved of all further liability as a contributory or otherwise.

Society, Ex parte Charnock (1890), 45 Ch. D. 463; 59 L. J. Ch. 823; 39 W. R. 74; 63 L. T. 483. There were, however, no outside creditors in this case.

(*h*) (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757; 10 Rettie (H. L.) 19; 20 Sc. L. R. 481; affirming, with a variation, the decision below, 8 Rettie, 917; 18 Sc. L. R. 661.

A similar question arose in *Tosh* v. *North British Building Society* (*i*), where the society was unincorporated. It was held, reversing the decision below (*j*), and following *Brownlie* v. *Russell*, that the advanced members were entitled to redeem on the same terms as if no winding-up had occurred, and were not bound to remain members and bear a share of the losses sustained by the society. It was attempted to distinguish *Brownlie* v. *Russell* on the ground that in that case the society was incorporated; and this distinction no doubt did exist, but the House considered that though sect. 14 of the Act of 1874 had of course been noticed in *Brownlie's Case*, no substantial reliance had in fact been placed on it, and the decision would have been precisely the same if the society had been registered only under the Act of 1836.

Tosh v. *North British Building Society.*

In both these cases, it is to be observed, the advanced members were entitled under the rules to share profits, but it was held that this alone would not render them liable to share losses. The point is put by Lord Bramwell with the utmost plainness: "Now that I understand to be the contention of the appellants. What is there in the rules to justify it? There is not one word in the rules about losses being borne either by the advanced or unadvanced members; and the only reason that can be given why the advanced members or anybody else should bear the losses is that they were to have profits if there were any. So they will undoubtedly; but it does not follow from that that they

Sharing profits.

(*i*) (1886), 11 App. Cas. 489; 35 W. R. 413; 14 Rettie, 6; 24 Sc. L. R. 128.
(*j*) 12 Rettie, 1271; 22 Sc. L. R. 833.

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are to bear losses. It might have been a reasonable stipulation to put in if they had thought of it; but either they did not think of it, or, as Mr. Davey put it, if they did think of it, they did not consider that it was reasonable to put it in, and we cannot put it in upon some speculation that if they had thought of it they would have put it in" (*k*).

Re Middlesbrough, &c. Society.

In *Re Middlesbrough, Redcar, and Saltburn, &c. Building Society* (*l*), another attempt was made to put advanced members on the list of contributories, but the learned judge, Stirling, J., held that they were under no such liability, and were entitled to redeem on the terms expressed in the rules as if no winding-up order had been made; and to the same effect is *Re Britannia Permanent Benefit Building Society* (*m*). There the mortgage given by an advanced member was expressed to secure payment of "all share or subscription money, expenses, fines, forfeitures, and moneys whatsoever to be paid by the mortgagor pursuant to the rules of the said society in respect of the shares so received by him in advance as aforesaid, or otherwise in respect of his being a member of the said society," and the learned judge, Kekewich, J., held that the advanced shareholder was a mere debtor to the society, and not a shareholder liable as a contributory, and consequently that his executors could not be placed on the list.

Re Britannia Society.

Re Doncaster Permanent Building Society.

In *Re Doncaster Permanent Building Society* (*n*) advanced members, by rule 28, were to be entitled to

(*k*) *Brownlie* v. *Russell*, 8 App. Cas. p. 260.
(*l*) (1889), 58 L. J. Ch. 771; 5 T. L. R. 516.
(*m*) (1891), 65 L. T. 196; W. N. 123.
(*n*) (1866), 3 Eq. 158; 15 W. R. 102; 15 L. T. 270; 31 J. P. 310.

be released from their mortgages on payment of subscriptions for fourteen years, or when the amount so paid should equal the sums advanced, with the interest and other charges thereon, and they thereupon ceased to be members. But they might redeem by paying a fine of 10*s.* a share and the subscription for fourteen years in advance, less a certain discount, together with all fines and other charges due on the shares. It was held that members who redeemed under an order made in the winding-up were not liable to contribute to satisfy the claims of the unadvanced shareholders, because, although the redemption clause did not so provide in terms, they had practically ceased to be members.

Outside creditors.

But where there are outside creditors whose claims have to be provided for, advanced members of an unincorporated society will, as we have seen, be liable to be placed on the list of contributories: see *Re West London and General Permanent Benefit Building Society*, cited *ante*, p. 385; and in *London Provident Building Society* v. *Morgan* (*o*), it was held that advanced members of an incorporated society must also be placed on the list until they redeemed their securities, at any rate while any outside creditors remained unpaid.

Selkirk v. *Taylor.*

Another case which occurred in the winding-up of the North British Society raised a somewhat different point. A subscriber for forty 25*l.* shares, represent-

(*o*) [1893] 2 Q. B. 266; 62 L. J. Q. B. 544; 42 W. R. 157; 69 L. T. 595; 57 J. P. 696; 5 R. 510; 9 T. L. R. 576. The further decision in this case that these advanced members could be compelled to pay up the balance of their advances immediately is no longer law: see *post*, p. 402.

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ing a nominal capital of 1,000*l.*, had obtained an advance of 500*l.* After the decision in *Tosh's Case*, he maintained that the advance ought to be treated as having been made in respect of all his shares, and consequently that as he held no unadvanced shares he was under no liability for losses. This ingenious contention, however, was rejected, the Court of Session holding that an advance being payment of a share by anticipation, it must be either of 25*l.* (the amount of a share) or of some multiple of that sum; that the advance of 500*l.* was therefore payment by anticipation of a corresponding number of shares, viz., twenty; and that the liquidator was right in treating the holding as consisting of twenty advanced shares and twenty unadvanced (*p*).

Liability of advanced member on redemption.

Buckle v. *Lordonny*.

The question of an advanced member's liability to bear a share of the losses may, of course, arise otherwise than in a liquidation; thus, in *Buckle* v. *Lordonny* (*q*), it arose in an action to redeem. In that case there were no outside creditors, and the losses, a share of which it was sought to throw on the plaintiff, were all sustained after the date of his advance. In the absence of any provision to that effect in the rules, Mr. Justice Kay held that advanced members were not liable to share the losses, and that the plaintiff, who had completed his repayments, was entitled to the usual statutory receipt.

(*p*) *North British Building Society* v. *M'Lellan* (1887), 14 Rettie, 827; *S. C. nom. Selkirk* v. *Taylor*, 24 Sc. L. R. 600.

(*q*) (1887), 56 L. J. Ch. 437; 35 W. R. 360; 56 L. T. 273; 3 T. L. R. 69; 51 J. P. 422; and see *Durham and Northumberland Working Men's Permanent Building Society* v. *Davidson*, cited *post*, p. 395.

If profits have been made and credited to a member year by year they cannot afterwards be taken away or deducted from his account in order to meet losses incurred in some subsequent year, nor is any express rule required in order to justify directors in thus declaring profits from time to time (*r*). Where, however, the rules did not provide for payment except on the termination of the society, a member was held not entitled on withdrawal to be paid the share of profit then standing to his credit, as there might in future be a loss (*s*).

Profits once declared cannot be recalled.

But advanced members will be liable to share losses if there is a special contract to that effect. In a case that came before Mr. Justice Chitty an unincorporated society was being wound up by the Court. There was enough to pay outside creditors, but not enough to pay the investing members the full value of their shares, and the question arose whether the advanced members were liable to contribute to the loss which must otherwise fall on the investing members alone. The material rules were as follows:—

Advanced members liable for losses by special contract.

RULE XXXIX. *Surplus Profits.*

1. "That the present and future surplus arising from the transactions of the society, after providing for all liabilities, shall from time to time be appropriated equitably and equally between the investing and borrowing members by way of bonus, in proportion to the number of shares held by each member, and the period subscribed for to the society."

"Surplus profits."

3. "No bonus to be paid until the shares be realized or withdrawn."

(*r*) *Tosh* v. *North British Building Society* (1886), 11 App. Cas. 489, 504; 35 W. R. 413; 14 Rettie, 6; 24 Sc. L. R. 128; *Oldham* v. *Hyde Permanent Building Society*, Palatine Court of Lancaster, January 23rd, 1895.

(*s*) *Timperley* v. *Crewe Society*, Reg. Rep. 1906, p. 7.

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RULE XL. *Deficiency of Income.*

"Deficiency of income."

1. "The directors shall, every three years at least, take into consideration the general affairs and the gross receipts and expenditure of the society at special meetings of their body, to be called for that purpose by the manager, and if they shall determine at such special meeting that there is a deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and shall be paid by them severally and respectively forthwith, or by such monthly or quarterly instalments as the directors shall determine, and if the same shall not be paid accordingly, every member who makes default shall pay the same fines as for an equal amount of subscriptions or repayments in arrear as the case may be."

"Liabilities."

The learned judge considered that the "liabilities" to be provided for under these rules included sums payable to investing members, and that "income" in rule 40 was not used in contradistinction to "capital," but meant everything that 'came in,' whether repayments by advanced members, moneys borrowed from outside creditors, or anything else. He accordingly held that the advanced members were liable to contribute to losses together with the investing members, and that the fact that the directors had not apportioned or determined the loss made no difference, as the court could apportion the liability in the winding-up. Advanced members were consequently not entitled to redeem except on terms of paying what might be due from them on this account (*t*).

(*t*) *Re West Riding of Yorkshire Permanent Benefit Building Society* (1890), 43 Ch. D. 407; 59 L. J. Ch. 197; 33 W. R. 376; 62 L. T. 486; 6 T. L. R. 160; and see also *Re Albion Mutual*

Past advanced members.

But in the same winding-up, it was held that advanced members who had repaid their advances and received back their deeds with the usual statutory receipt before the commencement of the winding-up, were entirely discharged and could not be placed on the list of contributories (*u*).

Liability to preference shareholders.

As to the liability of advanced members to contribute to the payment of what is owing to preference shareholders, see *Re Reliance Permanent Benefit Building Society*, cited *ante*, p. 386.

Durham, &c. Society v. Davidson.

In another and very instructive case, the mortgage contained a covenant by the advanced member to pay to the society "All subscriptions, fines, and other moneys" which according to the rules of the society should from time to time be payable by him. Rule 12 was as follows:—

"The directors shall be empowered to deduct annually from the amount standing to the credit of each member, whether unadvanced or advanced, such sum as may be necessary to meet the current expenses and contingencies of the society; and, in case any member withdraws from the society during the course of the year, such withdrawing member shall have deducted from the amount payable to him such sum as shall be considered his just proportion thereof. The amount of such deduction to be calculated *pro ratâ* according to the shares or interest of the member in the society; provided, nevertheless, that, if the profits of the society shall be sufficient to meet all expenses and contingencies (determinable by the directors), then no deduction as aforesaid shall be

Permanent Benefit Building Society (1888), 43 Ch. D. 410, n., where the rule was very similar; *Re West London and General Permanent Benefit Building Society*, cited *ante*, p. 385.

(*u*) *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463; 59 L. J. Ch. 823; 39 W. R. 74; 63 L. T. 483.

made. All fines, contributions, and fees whatsoever mentioned in the rules (except remuneration fees payable to the officers) shall be applicable to pay expenses and contingencies."

The defendant became a member in May, 1888. At that date the secretary had been for some time misappropriating moneys of the society, but his defalcations had not been discovered. In August, 1888, they were discovered, and he absconded. The current year of the society ended on October 8th, 1888. The question arose, what (if anything) the defendant was liable to pay to the society as his proportion of the loss resulting from the defalcations of the secretary. He had claimed to redeem his mortgage, but the directors had refused to allow him to do so unless he paid his proportion of the loss, to meet which they had deducted 27 per cent. from the amount standing to the credit of each unadvanced member, and added 27 per cent. to the amount payable by each advanced member; and they accordingly claimed a sum of 118*l.* 2*s.* 2*d.* as due from the defendant under the mortgage deed and the rules on this account. Mr. Justice Day held that the loss resulting from the defalcations, although to a great extent it had taken place before the defendant became a member, was a "contingency" within the meaning of rule 12; that it arose when the defalcations were discovered; and that the defendant was bound to go on paying his subscriptions and fines until there should be standing to his credit an amount sufficient to discharge his share of the loss. The case then went to the Court of Appeal, and after it had been twice argued and judgment reserved the decision of the learned judge was reversed. "The first question," said Lord Her-

schell, "which arises is whether the loss due to the secretary's misappropriation is a contingency within the meaning of this rule, and the next, if it be so, what power the rule confers upon the directors in respect of it. It is not necessary to determine whether it is a contingency within the rule, because, even assuming that it is, I think the defendant is entitled to the relief he claims by his counterclaim, though my impression is that the learned judge rightly held that, where an unexpected loss or liability is ascertained in the course of any year, it is a contingency which the directors are empowered to deal with under the rule. But it is, to my mind, perfectly clear that in the case of a contingency within the rule, the only power which the directors possess is to make, for the purpose of meeting it, a reduction from the amount standing to the credit of members. There is no power to place any sum to their debit, or to create any debt or liability. What is meant by the amount 'standing to the credit of each member, whether advanced or unadvanced,' is made clear by the provisions contained in the rules. In the case of unadvanced shares, it consists of subscriptions and interest; in the case of advanced shares (by rule 26) of the amount of payments made by the member, less interest on the mortgage debt at the rate of 6 per cent. per annum. It is with these sums, and these alone, that the directors have power to deal by way of deduction from them. At the period with which we are dealing, there appear to have been held by the members 448 unadvanced shares, with a balance standing to their credit of 1,183*l.* 0*s.* 11*d.*, and 127⅓ advanced shares, the amount standing to the credit of members in respect

CHAP. X. thereof being 154*l.* 15*s.* 9*d.* The 12th rule prescribes that the amount of deduction is to be calculated *pro ratâ*, according to the shares or interest of members in the society. From the amount standing to the credit of members whose shares were unadvanced, the directors deducted 27 per cent.—a proceeding, I think, in complete conformity with the rule; but they dealt with the members whose shares were advanced in a manner entirely different. They disregarded altogether the amount standing to their credit, and added 27 per cent. to the amount which they owed to the society in respect of their advance. I am unable to see any justification for this. They could not, in the case of members whose shares were advanced, any more than in that of the unadvanced, do anything beyond making a deduction from sums standing to their credit; and if they made a deduction which wiped out the whole of the credit, it was the utmost they had power to do. I cannot see on what principle it was thought right that the 127 advanced shares should bear something like three-fourths of the loss, whilst the residue only was to fall on the 448 unadvanced shares. The rule does not require that the reduction should be calculated *pro ratâ* upon the shares held, the words being 'share or interest'; and I see no reason to differ from the directors in thinking that the proper mode of making the deduction was to make it proportionate to the amount standing to the credit of each member. The true measure of a member's interest in the society is the amount standing to his credit. The member who has paid his share almost in full, and one who has only paid a single subscription, cannot be said to have an

equal interest in the society. The share of the latter represents little more than the obligation (unless he withdraws) to pay future subscriptions. But if the course adopted was proper in the case of unadvanced shares, it was, in my opinion, equally so in the case of the advanced. The interest of the latter in the society was certainly not measured by the debts they owed it. It was, I think, therefore open to the directors to make a deduction which would have the effect of wiping out the amount standing to the credit of all the members, whether advanced or unadvanced; but beyond this they could not go. There was enough standing to the credit of the members to meet, within a few pounds, the loss sustained by the society. The rule with which we are dealing requires the directors to deduct annually the sum necessary to meet current expenses and contingencies, but it further provides that no deduction is to be made if the profits of the society are sufficient to meet all expenses and contingencies; and, further, that all fines, contributions, and fees mentioned in the rules should be applied to pay expenses and contingencies. The question whether, where a deduction cannot be made in any given year sufficient to meet a contingency, deduction may be made in respect of the balance in the following year, is one of some difficulty, but a determination of it is not necessary to the decision of the present case. Even if a further deduction had been made in the subsequent year of the amount necessary to provide for the balance, the amount tendered by the counterclaim would still be sufficient. For the reasons I have given, I think that, even assuming the case to be within the rule, the directors cannot make good the

CHAP. X. position taken up by them, that the defendant can only redeem on payment of the amount which they placed to his debit. The 28th rule enables a member desirous of having his property discharged from the mortgage to the society, before the expiration of the full term thereof, to be allowed to do so 'on payment of all repayments, subscriptions, and fines due in respect thereof up to the time of such redemption, and of all other contributions and payments required by the rules.' Under the terms of this rule the member may insist on redeeming his mortgage on paying the amount due after allowing for the sum standing to his credit, any deduction properly made by the directors under rule 12 being, of course, taken into account in ascertaining what sum does stand to his credit. The defendant, by the counterclaim, offered to pay 436*l*. 17*s*. 4*d*., and claimed to redeem on these terms, and I think he was entitled to do so. So far, I have dealt with the case on the basis that rule 12 applies. If it does not, the right of the defendant to redeem on the terms he claims is still more clear. I think that the judgment on the counterclaim must be reversed and judgment entered thereon for the defendant." The other members of the Court (Lindley and Kay, L. JJ.) concurred in this judgment, but Lord Justice Kay considered that the terms of rule 12 were not sufficiently explicit to render members liable, even to the extent of moneys standing to their credit, to make good losses incurred by the society (*v*).

(*v*) *Durham and Northumberland Working Men's Permanent Building Society* v. *Davidson* (1892), 61 L. J. Q. B. 473; 67 L. T. 269; 56 J. P. 660; 8 T. L. R. 428.

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Payment by instalments after winding-up order.

If a winding-up order has been made an advanced member of an unincorporated society is not, it seems, entitled to go on paying by instalments, but can be compelled to pay up the whole balance at once. In *Scottish Property Investment Company Building Society* v. *Boyd* (*w*), indeed, it was held, there being no outside creditors unpaid, that an advanced member could not be compelled, on the society going into liquidation, to repay his loan otherwise than by instalments as stipulated in his bond. But, on the other hand, in *Finlay's Case* (*x*), where the borrowing members had obtained loans on bonds and dispositions in security in ordinary form with an obligation of repayment at the first term of Whit Sunday or Martinmas after the loan was granted, although the rules of the society provided that the advance should be repaid by instalments only, the Court held, following the case of the *Greenock Property Investment Company* (*y*), that the liquidator was entitled to enforce payment of the amount advanced in terms of the bond, and that although there were no outside creditors the members could not claim to pay off their advances by instalments merely on their shares as they would have done had the society continued its business. *Finlay's Case* was afterwards taken to the House of Lords, *nom. Tosh* v. *North British Building Society* (*z*), but the appeal on

(*w*) (1884), 12 Rettie, 127; 22 Sc. L. R. 43. See also *Cordingley* v. *Alliance Society* (1887), W. N. 220, a case of a voluntary winding-up.

(*x*) *Trustees of the North British Building Society, Finlay's Case* (1885), 12 Rettie, 1271; 22 Sc. L. R. 883.

(*y*) (1884), 11 Rettie, 976; 21 Sc. L. R. 701.

(*z*) (1886), 11 App. Cas. p. 489; 35 W. R. 413; 14 Rettie, 6; 24 Sc. L. R. 128.

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this point was abandoned, and it has since been decided that advanced members are liable to be placed on the list of contributories, and as such are compellable to pay up their balances immediately, but less any discount to which they would be entitled upon a voluntary redemption under the rules (*a*); and this would seem to be still the law in the case of an unincorporated society. If, however, the society is incorporated, it is now expressly enacted that an advanced member shall not be liable to pay the amount payable under the mortgage or other security or rules except at the time or times and subject to the conditions therein expressed (*b*).

Liability of advanced member under rule adopted since his advance.

As to how far an advanced member is liable to share in losses when the rule creating the liability was only adopted subsequently to the date of his advance, see *ante*, p. 287.

Mortgage executed in ignorance of its contents.

In *Empson's Case* (*c*), the surveyor of a building society, at the request of the directors, agreed to purchase land of the society on the understanding that he could immediately mortgage it to the trustees for the full amount of the purchase-money. The land was conveyed to him, and he executed, without reading it or knowing its contents, a deed prepared by the solicitor of the society mortgaging the land to the trustees, which the mortgagor believed to be an ordinary mortgage for securing the purchase-money and interest. The deed

(*a*) *London Provident Building Society* v. *Morgan*, [1893] 2 Q. B. 266; 62 L. J. Q. B. 544; 42 W. R. 157; 69 L. T. 595; 57 J. P. 696; 5 R. 510; 9 T. L. R. 576. There were outside creditors in this case, which was a voluntary winding-up under supervision.

(*b*) Building Societies Act, 1894, s. 10, which came into operation on the passing of the Act, August 25th, 1894.

(*c*) (1870), 10 Eq. 597; 18 W. R. 765; 22 L. T. 855.

in fact recited that he was a member of the society, and had subscribed for a certain number of shares, and that the purchase-money had been advanced to him in respect of his shares, and it contained a covenant by him to make payments on the shares according to the rules of the society. He never applied for shares, and did not comply with any of the conditions prescribed by the rules for the admission of members, his name was not entered in the register of members, and the directors never called upon him to make any payments as a member. Two years after the date of the mortgage the society was ordered to be wound up. Under these circumstances it was held by Malins, V.-C., that the mortgage deed did not represent the real transaction, and that the mortgagor could not be made a contributory.

Priority of deceased members.

4. It appears to be now settled that (subject to any provision to the contrary in the rules) death operates as an immediate withdrawal and that the representatives of members who died before the commencement of the winding-up are entitled to be paid in priority to the other members of the society, including any who may have given notice to withdraw; see *Re West London and General Permanent Benefit Building Society* (*d*), and *Re Counties Conservative Permanent Benefit Building Society, Davis* v. *Norton* (*e*). In the former case the rule was as follows:—"If more than one member shall give notice to withdraw at one

(*d*) (1898), 78 L. T. 393; 14 T. L. R. 304; 42 Sol. J. 363.
(*e*) [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71; and see *ante*, p. 249.

CHAP. X.

time they shall be paid in rotation, according to the priority of notice; provided always that the widows and children of deceased members shall always have the precedence." In the latter case Stirling, J., says: —"As to the priority of the deceased member, I think the matter is really covered by the decision of the Court of Appeal in *Re West London and General Permanent Benefit Building Society*, because there it is broadly laid down by Lindley, M. R., that 'there is nothing requiring notice of withdrawal to be given. Whether a member gives notice to withdraw or not, on his death he ceases to be a member.' That is the basis of the decision. There is nothing in these rules which takes this case out of that. I think, therefore, that the executors of a deceased member take priority according to the declaration that is contained in the order in that case. The effect of it seems to be that a deceased member will take precedence of all persons who have given notice to withdraw. The rights must be determined at the date of the dissolution" (*f*).

Priority of withdrawn and realised shares.

5. It is well settled that members whose notices to withdraw have expired before the commencement of the winding-up are, as between themselves and the other members, substantially in the position of creditors, and will be entitled, notwithstanding the winding-up, to the benefit of any priority of payment given them by the rules; but they cannot, of course, compete with creditors properly so called.

Effect of a winding-up order

The effect of a winding-up order on the right to

(*f*) [1900] 2 Ch. p. 825.

withdraw was considered in *Brownlie* v. *Russell* (*g*). In that case Lord Selborne in the course of his judgment said:—"I cannot but think that the true effect of the winding-up order is that which was put to your Lordships by Mr. Davey in his able argument. I think that it prevents the exercise of the option of retiring or withdrawing which was given to all the members, to the unadvanced members under the 9th rule and to the advanced members under the 12th, as to which I hold that the rules contemplate a going concern. That is consistent with the opinion expressed by Vice-Chancellor Wood in the case before him, who spoke of the winding-up order as substantially putting a stop to the whole thing. It takes away the option which otherwise, if the concern had been a going one, would have belonged to each member—it, by a *vis major*, as the Vice-Chancellor said, puts a close to the whole concern—it terminates, at that date, the account of each shareholder—it cuts off all chance of profit which, if the thing had gone on, both classes of members might have had under the 5th rule. It is equivalent, not to an optional withdrawal or retirement by individual members, but to a compulsory withdrawal by the operation of the winding-up order as against them all."

CHAP. X. on the right to withdraw.

In *Walton* v. *Edge* (*h*), the rules allowed any investing member to withdraw, "provided the funds

Walton v. *Edge.*

(*g*) (1883), 8 App. Cas. 235; 48 L. T. 881; 10 Rettie (H. L.) 19; 20 Sc. L. R. 481; 47 J. P. 757.

(*h*) (1884), 10 App. Cas. 33; 54 L. J. Ch. 362; 33 W. R. 417; 52 L. T. 666; 1 T. L. R. 96; 49 J. P. 468; affirming *S. C.* below, *nom. Re Blackburn and District Benefit Building Society*, 24 Ch. D. 421; 52 L. J. Ch. 894; 32 W. R. 159; 49 L. T. 730.

CHAP. X. permit," upon giving notice, and declared that "no further liabilities shall be incurred by the society till such member has been repaid." The society was ordered to be wound up, and the assets were insufficient to pay everybody. It was held that those investing members who had given notice of withdrawal, and whose notices had expired before the winding-up began, were entitled to be paid out of the assets (after payment of the outside creditors) in priority to those members who had not given notice of withdrawal, notwithstanding the fact that between the giving of the notices and the winding-up there never were any funds available for their payment, and that some of the notices accepted by the directors were not in the form prescribed by the rules. "Then what is there in this contract to say that, if the funds do permit the payment to be made, though it was not possible before the winding-up, yet if it becomes possible after that time, it shall not be done? Certainly there is nothing on the face of the contract to that effect; there is nothing to say that in any case when there are funds with or without winding-up, the non-withdrawing members are to come into competition with the right thus given to the withdrawing members. Is there anything to that effect in the Act under which building societies are liable to be wound up? Nothing whatever. The particular terms of that Act have not been referred to, but they are familiar to your Lordships. It provides that when there is a winding-up the transactions of the society are to stop; there can be no new contracts entered into; there can be no change of the position in which the parties stand at that time; no new notice of withdrawal

can be given, or anything of that character; and an official liquidator is appointed, who is to collect the assets of the society and to administer them in a due course of administration, paying creditors first and the costs of the winding-up, and then if there is a surplus that surplus is to be applied according to the rights of the members *inter se*. If the members had contracted with each other before the winding-up that in an event which had happened before the winding-up a particular member should have a right to be paid off his share or a sum which he desired to withdraw, as soon as the funds should permit, then the moment the funds of the society are cleared from claims prior to his right that right must take effect in a due course of administration under the winding-up, just as it would have done before. In adjusting the rights of the members *inter se*, without going into any technical questions as to the use of the word 'creditor,' those members are to be preferred who under the contract have the right to a preferable payment out of the free assets, the free funds, when they exist" (*i*). This decision was followed by the Court of Appeal in *Re Alliance Society* (*j*), by Mr. Justice Kay in *Re Middlesbrough Building Society* (*k*), and by the Court of Session in Scotland in *Trustees of the North British Building Society* (*l*).

In a case that occurred in New Zealand, there was a provision in the rules that in no case should more than

(*i*) *Per* the Earl of Selborne, L. C., 10 App. Cas. p. 37.
(*j*) (1885), 28 Ch. D. 559; 54 L. J. Ch. 540; 52 L. T. 695.
(*k*) (1885), 53 L. T. 203; 20 L. J. N. C. 142.
(*l*) (1885), 12 Rettie, 1271; 22 Sc. L. R. 833.

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one-half of the weekly receipts be applied in payments to withdrawing members, the other half being reserved for borrowing members. It was held that withdrawing members, who, under the rules, became on the expiration of their notices absolutely entitled to payment, must be paid in priority to members who had not withdrawn, the effect of the proviso being merely to postpone payment to a withdrawing member if it should be necessary for the purpose of carrying on the business of the society; these members were therefore to be paid in rotation according to the priority of their notices, with interest to the time of payment at a rate specified in the rules (*m*).

Re Mutual Society.

In *Re Mutual Society* (*n*), the Master of the Rolls (Sir George Jessel) on the rules of the particular society before him came to a different conclusion, but the case is only briefly reported, and lays down no general principle. All that it decided was that where there was a special fund pointed out for payment of withdrawing members—a fund that did not and could not exist after the winding-up—the members who were only to be paid out of that fund could not be paid when the fund did not exist (*o*).

Re Counties Conservative Building Society.

In *Re Counties Conservative Permanent Benefit Building Society, Davis* v. *Norton* (*p*), the rules provided that members might withdraw on giving a certain notice; that the amounts receivable on with-

(*m*) *Re Auckland Permanent Co-operative Building and Investment Society* (1899), 17 N. Z. L. R. 634.

(*n*) (1880), 24 Ch. D. 425, n.

(*o*) *Per* Bowen, L. J., 24 Ch. D. p. 437; and see *per* Lord Selborne, L. C., 10 App. Cas. p. 40, and *per* Lord Blackburn, *ibid.* p. 44.

(*p*) [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71.

drawal should be subject to any payments or deductions as might be determined by the directors; that payment of withdrawals should be made according to priority of notice, and that the directors should have power to limit the number of shares to be withdrawn in any one month, and to limit the withdrawals so that they should not exceed one-half of the monthly income from share subscriptions. The directors had determined by resolution "that the terms of the rules limiting the shares withdrawable be enforced." It was held by Stirling, J., all outside creditors having been paid, that members who had given notice of withdrawal which expired before the commencement of the winding-up were entitled to be paid in full in priority to those whose notices had matured later, or who had given no notice at all.

Realized or completed shares.

Again, the holders of realized or completed shares will, if the rules so provide, be entitled to a priority similar to that enjoyed by members who have given notice of withdrawal. In *Re Norwich and Norfolk, &c. Building Society, Ex parte Rackham* (*q*), "realized" members who had by their subscriptions, with interest and bonuses, made up the full amount of their shares, were entitled to payment, or certificates for payment, in rotation, of such amount; and "withdrawal" members who had not made up the full amount of their shares, but had given notice to withdraw, were entitled to like payment or certificates for the amount of their

(*q*) (1876), 45 L. J. Ch. 785; W. N. 186, 230. For a case of disputed priorities between "matured" and "withdrawn" shares, under very obscure rules, see *Syme* v. *United Victoria Permanent Building Society* (1898), 29 V. L. R. 671, 917.

CHAP. X. subscriptions, with interest. The Court of Appeal held, affirming the decision of Hall, V.-C., that these two classes were entitled to be paid in full in priority to investing members who had not made up their shares and had not given notice of withdrawal.

In *Thompson* v. *Atlas Permanent Building Society* (*r*), it was held on the special terms of the rules that the order of priority was as follows:—First, representatives of deceased or insane members who had given notice to withdraw; secondly, holders of realized shares; thirdly, holders of paid-up shares who had given notice to withdraw according to the priority of their notices.

Where the rules showed that matured shareholders were entitled to be paid in any event at the moment of maturity, while withdrawing members might be postponed if half of the weekly receipts were insufficient to meet the withdrawals, and other funds were not available, it was held that the matured shareholders were entitled to payment in priority to shareholders who had withdrawn, but that they were not entitled to interest, the rules not mentioning interest in their case (*s*).

In *Trustees of the North British Building Society* (*t*), any member holding any unadvanced share which by the subscriptions and the profits thereon had accumulated to 25*l*., the amount of the share, was entitled to receive that amount with interest from the date of

(*r*) (1894), 97 L. T. Journ. p. 218; *Times*, June 29th, p. 13.
(*s*) *Re Auckland Permanent Co-operative Building and Investment Society* (1899), 17 N. Z. L. R. 634.
(*t*) (1885), 12 Rettie, 1271; 22 Sc. L. R. 833.

completion—his connection with the society thereupon ceasing—but the directors were not to be bound to pay him out until three months after the payment fell due, and then only along with withdrawals (who were also entitled to priority) in their order and as the funds permitted. It was held that the owners of completed shares were entitled to priority along with the owners of shares withdrawn.

In another case (*u*) the rules provided that when the profits with the instalments paid amounted to 25*l*. per share members should be paid out, provided that where members were paid out during the currency of the financial year they should only be entitled, in lieu of profits, to interest from the date of the immediately preceding balance on the sum standing at their credit at such rate as the directors might from time to time fix, and such interest might, in the option of the directors, be dealt with as profits in the maturing of shares. The society stopped business and suspended payment on December 24th, 1883, and a winding-up order was subsequently made. It was held that a member whose shares, with the addition of interest at the rate fixed by the directors for the year, had matured before December 24th, 1883, was entitled to priority.

Where shares have matured in accordance with the rules, and are marked in the society's books as fully paid up, the mere fact that certain trifling payments are still due from the member in respect of them will not prevent the shares being treated as realized (*v*).

(*u*) *Blair* v. *Broadfoot's Trustees and Lyle* (1890), 27 Sc. L. R. 859.

(*v*) *Trustees of the North British Building Society* (1885), 12 Rettie, 1271; 22 Sc. L. R. 833.

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Conversion of realized or paid-up shareholder into creditor.

As to the conversion of a realized or paid-up shareholder into a depositor or creditor, see *Re Sheffield Permanent Building Society*, *Crookes's* and *Brailsford's Cases* (*w*), where the Court held that though such a conversion was possible enough it had not under the circumstances been effected.

Effect of winding-up on current notices of withdrawal.

In most societies a certain length of notice is required on withdrawing, and only those notices which have actually matured before the commencement of the winding-up will confer priority. If a winding-up supervenes while the notice is running the effect is to annul the notice and the priority is lost (*x*); and, moreover, it has been decided that if there is a stoppage of the society's business, or a recognition by those entitled to form a judgment that it must be stopped, this alone, though no winding-up order may yet have been made, will extinguish the right of withdrawal, so that no notices to withdraw can be given after that date, and no notices then current can become effective in the winding-up (*y*). "It is not the order to wind up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case puts an end to the right to withdraw" (*z*).

(*w*) (1889), 5 T. L. R. 211.

(*x*) *Selkirk* v. *Taylor* (1887), 24 Sc. L. R. 600; *S. C. nom. North British Building Society* v. *M'Lellan*, 14 Rettie, 827.

(*y*) *Re Ambition Investment Building Society*, [1896] 1 Ch. 89; 65 L. J. Ch. 113; 44 W. R. 141; 73 L. T. 508; 2 Manson, 607; *Trustees of the North British Building Society* (1885), 12 Rettie, 1271; 22 Sc. L. R. 833; *Re Sunderland 36th Universal Building Society* (1890), 24 Q. B. D. 394; 59 L. J. Q. B. 217; 38 W. R. 509; 62 L. T. 293; 54 J. P. 613; 6 T. L. R. 199; *Strand* v. *Permanent Mutual Benefit Building and Investment Society* (1897), 18 N. S. W. R. Eq. 194; *Re Co-operative Starr-Bowkett Permanent Land and Building Society* (1896), 22 Vict. L. R. 47.

(*z*) *Per* Mathew, J., 24 Q. B. D. p. 405.

In *Trustees of the North British Building Society*, the directors on May 13th, 1882, issued a circular to the members intimating that, looking to the state of the finances, and to the fact that a number of members had given notice to withdraw, they had resolved to take steps "to put all the members on an equal footing." With this view they suggested that all members should give notice of withdrawal. After the issue of this circular, no business was done and no new members admitted. On the society afterwards going into liquidation, it was held that the liability of members to share losses must be calculated as at the date of the circular, and that notices of withdrawal subsequent thereto could not receive effect.

North British Case.

The *Sunderland Case* was a remarkable one. There was a series of ten terminating societies in Sunderland whose rules were practically identical, the rule as to withdrawal being as follows:—

Sunderland Case.

"On and after the expiration of the first twelve months any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and should more than one member give notice to withdraw at one time, the member so giving notice shall be paid in rotation, according to the priority of notice, provided that the said society shall not be required or obliged to make such payment as aforesaid until they have sufficient funds in hand for that purpose, and also to meet the then existing legal liabilities of the society."

The affairs of all the societies were under the direction of one secretary, and on his death in the summer of 1886 the books of the societies were placed in the

CHAP. X. hands of a firm of accountants, whose report showed that most of the societies, including the 32nd and the 36th, were insolvent. This report was submitted to an aggregate meeting of the shareholders of all the societies on February 14th, 1887, and at this meeting a resolution was passed recommending the appointment of a general committee, consisting of the directors and two delegates from each society, to consider the affairs of all the societies. The 32nd society held a meeting on February 16th, and the 36th society on the following day, February 17th, at which they decided to appoint delegates and to send a copy of the report to each shareholder. After February 17th no business was transacted by the 36th society and none by the 32nd, except that between February 16th and May 3rd, 1887, the latter society received a few pounds in subscriptions and paid some interest to paid-up shareholders, and held meetings to discuss suggestions for altering the rules. On May 3rd the general committee sent a notice to each shareholder urging him to give immediate notice of withdrawal. On June 17th resolutions were passed for voluntary winding-up, and on July 2nd a supervision order was made. Under these circumstances a Divisional Court (Lord Coleridge, C. J., and Mathew, J.) held that the rules only provided for withdrawal while the societies were or were believed to be solvent, and consequently, that two notices of immediate withdrawal given after February 17th, 1887, by members of the 36th society, and a notice given on October 8th, 1886, by a member of the 32nd to withdraw at the end of six months, conferred no priority in the winding-up. The Court gave leave

to appeal, and notice of appeal was given accordingly, but the case was afterwards compromised and the appeal abandoned.

Right of withdrawal, how determined.

To put an end to the right to withdraw, however, there must be some information that a winding-up is going to take place, or something special to affect the members with notice that the society is not to continue as a going concern. The mere fact that a special report and balance sheet have been issued showing a very considerable deficiency and that the society is in temporary difficulties which it is endeavouring to overcome by altering its rules and making a fresh start (*a*), or the fact that the society has 'taken in sail' and is carrying on its business slowly and cautiously (*b*), or the issue of a circular for the purpose of considering the question of dissolution (*c*), or the mere fact that the society is insolvent (*d*), will not be sufficient.

Stewart's Case.

In a case that came before the Court of Session in Scotland, the 71st rule provided that the books of the society should be balanced and the profits ascertained as on February 1st in each year, in such way as the directors should think proper. The 75th rule provided that "any member holding unadvanced shares shall be entitled to withdraw from the society on application to the directors in writing, and shall be entitled to receive the amount standing at his credit in the books of the society in respect of his shares as at the imme-

(*a*) *Barnard* v. *Tomson*, [1894] 1 Ch. 374; 63 L. J. Ch. 488; 70 L. T. 306; 8 R. 585, North, J., a dissolution under instrument.
(*b*) *Syme* v. *United Victoria Permanent Building Society* (1904), 29 V. L. R. 917.
(*c*) *Re Ambition Investment Building Society*, [1896] 1 Ch. 89; 65 L. J. Ch. 113; 44 W. R. 141; 73 L. T. 508; 2 Manson, 607, a winding-up under supervision.
(*d*) *Ibid.*

CHAP. X. diately preceding annual balance, together with the amount of subscriptions paid by him thereafter." The 76th rule provided that "applications for withdrawal shall be considered and granted by the directors in the order of priority and the dates on which these applications shall have been received by the manager, and payment shall be made to such applicants as soon as the directors shall have sufficient funds at their disposal, and not otherwise." The annual balance sheet of the society for the year ending January 31st, 1881, was embodied in the directors' report, dated March 30th. It was disapproved by the society and, after an investigation by the shareholders, an amended balance sheet was submitted by the directors, and approved by the society on July 28th. The amended balance sheet, instead of showing an apparent profit as in the original balance sheet, showed a loss, attributable to over-valuation of the assets, estimated at 40 per cent. of the value of the shares of all unadvanced members who had not given notice of withdrawal previous to February 1st, and stated that the deficiency must be written off these shares. In November the society went into liquidation. Certain unadvanced members, who had given notice of withdrawal on March 3rd, objected to the writing off of 40 per cent. from the value of their shares as they stood in the books of the society on February 1st. The Court held that the balance sheet approved on July 28th showed the balance for the year ending January 31st, and that 40 per cent. had been rightly written off the value of the objectors' shares (*e*).

(*e*) *Scottish Property Investment Company Building Society* v. *Stewart* (1885), 12 Rettie, 295; 22 Sc. L. R. 619.

Strand v. *Permanent, &c. Society.*

In a case that occurred in New South Wales the rules provided (1) that when the contributions of an investing shareholder amounted to 25*l.* for each share that sum should be paid to him and his connection with the society should cease: (2) that an investing shareholder of one year's standing might withdraw his shares on notice, and at the end of a month from the notice should receive the sum standing to his credit, but the board should not be compelled to apply more than half the monthly receipts in payment of withdrawals: (3) that there should be permanent shareholders whose shares should be of the value of 25*l.*, withdrawable only on the dissolution of the society, and who should receive one per cent. more interest than the investing shareholders: (4) that the society might under certain circumstances go into voluntary liquidation, in which case the provisions of the Companies Act as to voluntary liquidations should apply, but without prejudice to the priorities existing between the members of the society. The society went into voluntary liquidation, and there was a surplus after payment of outside creditors. It was held that the order of priority was as follows:—First, fully paid-up investing shareholders: Secondly, investing shareholders who had given effective notices of withdrawal: Thirdly, investing shareholders who had neither paid up in full nor withdrawn, and permanent shareholders *pari passu* (*f*).

Set-off.

A member who has given notice of withdrawal and afterwards accepts from the society a loan upon terms

(*f*) *Strand* v. *Permanent Mutual Benefit Building and Investment Society* (1897), 18 N. S. W. L. R. Eq. 194.

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under which he still continues to receive interest upon his share, but pays interest upon his advance, is not entitled in a winding-up to set off the amount of his share against the unpaid balance of his loan (*g*). The advance in this case was *ultra vires*.

In *Philipson* v. *Hale* (*h*), the defendant, a member of a co-operative loan society, gave notice to withdraw the amount standing to his credit, but as there were no funds to pay him the directors offered him an advance of a smaller sum repayable by instalments, which he accepted. By one of the rules a borrowing member could not withdraw until his loan was repaid. On an action being brought by the liquidator to recover the balance of the loan it was held that there was no right of set-off and the defendant must pay up in full what he owed and receive such dividend, if any, as the liquidator might be in a position to pay him. Compare *Re Gwaor-y-Gweithyr Industrial and Provident Society, Limited, Dovey* v. *Morgan* (*i*), where a set-off by the society was held valid under sect. 23 (2) of the Industrial and Provident Societies Act, 1893 (*j*).

Terms of withdrawal cannot be altered by mere resolution of society.

The contract under which a member is entitled to withdraw cannot be altered by a mere resolution of a majority, however large, of the other members; the only way in which the contract can be varied is by a formal alteration of the rules. Thus, a resolution adopted by a majority of the members that, in conse-

(*g*) *Re Counties Conservative Permanent Benefit Building Society, Davis* v. *Norton*, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71.

(*h*) (1880), 43 L. T. 503.

(*i*) [1901] 2 K. B. 477; 70 L. J. K. B. 614; 49 W. R. 655; 84 L. T. 824.

(*j*) 56 & 57 Vict. c. 39.

quence of losses sustained by the society, the sum of 7*s*. 6*d*. per pound should be deducted from all shareholders' accounts and placed to a suspense account, there being no winding-up and no rule as to the manner in which losses should be borne, was considered by the House of Lords to be plainly *ultra vires* and void, and a member who had given notice to withdraw some time after the date of the resolution, was held entitled to be paid the full amount standing to his credit in the books of the society without any such deduction (*k*). As to the extent to which the power to alter the rules is affected by the society's insolvency, see the cases cited *ante*, p. 74.

Cancellation of notice of withdrawal.

A member who has given notice of withdrawal may, of course, cancel his notice, and thus deprive himself of his claim to priority. Whether he has actually done so or not is sometimes a nice question of fact. An instructive case on this point is *Scottish Property Investment Co. Building Society* v. *Stewart* (*l*). In that case a shareholders' committee of investigation reported that, in consequence of the depreciation in the value of the society's property, and of the large proportion of unadvanced members who had given notice of withdrawal, two courses only remained open, either (1) immediate liquidation, or (2) to ask unadvanced members who had given notice of withdrawal to cancel their notices, but suggested "that should the second course be adopted, members should be asked to cancel their

(*k*) *Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197; 35 W. R. 632; 56 L. T. 776; 14 Rettie, 27; 3 T. L. R. 378; 24 Sc. L. R. 486, reversing the decision below, 12 Rettie, 1320; 22 Sc. L. R. 883.

(*l*) (1885), 12 Rettie, 925; 22 Sc. L. R. 619.

CHAP. X. notices only on the express understanding that these cancellings are not to be used unless shareholders representing, at least, nine-tenths of the amount under notice of withdrawal, should cancel their notices within a limited time." A majority of the committee "strongly recommended" the second course. The society subsequently "gave a general approval of the committee's report," and gave instructions for circulars to be sent out inviting members to cancel their notices of withdrawal. The circulars, which were in the name of the directors and signed by the president, commenced thus:—"The directors beg to refer to their report, dated 30th March last, and to the reports by the committee appointed by the shareholders, which have been read at the recent meetings of the society." The circulars did not mention the condition that the concurrence of shareholders representing nine-tenths of the amount under notice of withdrawal should be necessary to a valid cancellation, and the form of cancellation sent with the circular was absolute in its terms. Nine-tenths did not cancel their notices of withdrawal. The Court of Session held, that the cancellation by a member who had filled up and returned his notice was conditional upon nine-tenths of the members who had given notice of withdrawal likewise cancelling their notices, and as this condition had not been complied with, that the cancellation was inoperative. A member who gives notice to withdraw and afterwards accepts a loan from the society upon the terms that he shall receive interest on his share and pay interest on his advance will be held to have waived his notice (*m*).

(*m*) *Re Counties Conservative Permanent Benefit Building*

Interest on shares withdrawn.

A question not unfrequently arises whether members who have given effective notices of withdrawal are entitled to interest on the sum withdrawn. Irrespective of statute, the general rule as to the payment of interest is that it ought only to be allowed in those cases where there is a contract for payment of money on a certain day, or where there is a contract express or implied to pay interest, or where it can be proved that interest has been actually made of the money (*n*). And in *Caledonian Rail. Co.* v. *Carmichael* (*o*), Lord Westbury lays it down that "interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid."

3 & 4 Will. 4, c. 42, s. 28.

By the Act 3 & 4 Will. 4, c. 42, s. 28, it is provided that upon all debts or sums certain, payable at a certain time or otherwise, the jury (*p*), on the trial of any issue or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall

Society, Davis v. *Norton*, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71.

(*n*) *Per* Lord Ellenborough, C. J., in *De Haviland* v. *Bowerbank* (1807), 1 Camp. 50.

(*o*) (1870), L. R. 2 H. L. (Sc.) 56, 66.

(*p*) The Court has the same power as a jury in this respect; *per* Bowen, L. J., *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*, [1892] 1 Ch. p. 146.

CHAP. X. give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law (*q*).

The following cases have been decided as to the payment of interest on sums withdrawn:—

Re Middlesbrough Building Society.

In *Re Middlesbrough, &c. Building Society* (*r*), the rules provided that a withdrawing member should receive back his subscription money; that withdrawing members, whose shares were fully paid up, should receive 5 per cent. interest from the time such shares were so paid up or from the time the previous dividend was paid; and that if more than one should give notice to withdraw they should be paid according to priority of notice. It was held that the withdrawing members must be repaid the amount of their shares in priority to the other members, in rotation, according to the respective dates of their notices; and that members whose shares were fully paid up at the dates of their respective notices were entitled to interest on the amounts due to them, in the same order of priority, from the times when such shares were fully paid up, or from the times of the payment of the last dividend, until payment of the amounts due to them. See also

(*q*) As to the construction and effect of this Act, see *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169, 178; 28 W. R. 818; *Ward* v. *Eyre* (1880), 15 Ch. D. 130; 49 L. J. Ch. 657; 28 W. R. 712; 43 L. T. 525; *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*, [1892] 1 Ch. 120; 61 L. J. Ch. 294; 40 W. R. 194; 65 L. T. 722; affirmed in D. P. [1893] A. C. 429; 63 L. J. Ch. 93; 1 R. 271; 69 L. T. 637; 58 J. P. 36; *Re Horner, Fooks* v. *Horner*, [1896] 2 Ch. 188; 65 L. J. Ch. 694; 44 W. R. 556; 74 L. T. 686.

(*r*) (1885), 53 L. T. 203; 20 L. J. N. C. 142.

Re Reliance Permanent Benefit Building Society (*s*); *Perratt* v. *London Scottish Building Society* (*t*); *Re Auckland Permanent Co-operative Building and Investment Society*, cited *ante*, p. 410.

Interest not allowed.

On the other hand, in *Re Blackburn and District Building Society* (*u*), the rules provided as follows: —"All subscriptions when they amount to 1*l*. upon investment accounts shall have interest at the rate of 5 per cent., when they amount to 5*l*. they shall bear interest at 6 per cent., provided the funds permit, to be added at the annual audit, but such interest shall not be paid until the shares are realized or withdrawn. The directors shall have power to alter the rate of interest to be divided. Any surplus profits which may arise shall be carried to a reserve fund, to meet future contingencies, and if not required for that purpose a portion thereof may from time to time be divided amongst the members in such manner as the consulting actuary shall determine"; and also "Any member of the society shall be allowed to withdraw, provided the funds permit . . . by giving one month's notice." On May 14th, 1881, a member gave notice to withdraw, and subsequently claimed interest at 5 per cent. per annum from June 14th, 1881, till payment. The Court of Appeal held, however, that he was not entitled to this, as the contract to pay interest was contingent on profits, and applied only while the society was a going concern, and no profits were made during the period in

(*s*) (1892), 61 L. J. Ch. 453; 66 L. T. 323; 8 T. L. R. 526; W. N. 77.
(*t*) (1888), 59 L. T. 31.
(*u*) (1886), W. N. 22.

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question; and further, that as no time for payment was fixed by the rule, there was not a "debt or sum certain payable by virtue of some written instrument at a certain time," so as to entitle him to interest under the statute.

In *Re Sunderland 36th Universal Building Society* (*v*), it was held that shareholders whose notices of withdrawal had matured before the societies were known to be insolvent, but who had not received the sums due to them, were not, in the absence of a determination by the committee of the amount due to them for interest, entitled to interest.

Compound interest.

Compound interest will be allowed if the rules so provide (*w*).

Depositors.

Depositors, not members of the society, obtain no priority in the winding-up by reason of their having given notice to withdraw; they and depositors who have not given such notice, and the other creditors of the society all stand on the same footing, and must be paid *pari passu* (*x*). In a case that occurred in New Zealand, one of the rules provided that the repayment of deposits or loans, with such interest as might be agreed upon, should be a first charge on the funds of the society. It was held that debenture holders, holding debentures which purported to create a charge upon the funds of the society, were entitled to be paid in full,

(*v*) See *ante*, p. 413, where the rule is set out.

(*w*) *Re Doncaster Permanent Benefit Building and Investment Society* (1866), 14 L. T. 13.

(*x*) *Re Progressive Investment and Building Society, Limited, Ex parte Corbold* (1886), 54 L. T. 45; and see *Re Mutual Aid Permanent Benefit Building Society* (1885), 29 Ch. D. p. 189.

with interest at the rates mentioned in their debentures, in priority to all other claims (*y*).

Pensioners.

In a recent case the society, in addition to its proper and legitimate business of a building society, carried on banking and other businesses—all conducted by one board of directors and served by a common staff. In 1903 a correspondence clerk retired at the request of the board, and was promised a pension. In 1906 a clerk employed in the bank also retired under the like circumstances. Both pensions were paid till 1911, when the society was ordered to be wound up and the banking business was held to be *ultra vires*. Each clerk claimed to prove in the winding-up for the capital value of his pension. It was held that the pension of the correspondence clerk was merely a voluntary allowance not founded on any contract, and his claim therefore failed. It was further held that, apart from any question of contract, the bank clerk, being employed in a business which was *ultra vires* of the society, could not prove against its assets, and his claim was also disallowed (*z*).

Distribution of surplus assets.

6. After payment of debts and making due provision for priorities of withdrawn and realized shares, the surplus assets of the society must be divided among the members according to their rights and interests at the commencement of the winding-up under the rules.

Re Doncaster Permanent Building Society.

In *Re Doncaster Permanent Building Society* (*a*),

(*y*) *Re Auckland Permanent Co-operative Building and Investment Society* (1899), 17 N. Z. L. R. 634.

(*z*) *Re Birkbeck Permanent Benefit Building Society*, [1913] 1 Ch. 400; 82 L. J. Ch. 232; 108 L. T. 211; 29 T. L. R. 256; 20 Mans. 159, Neville, J.

(*a*) (1867), 4 Eq. 579; 36 L. J. Ch. 871.

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the rules provided that the shares should be of the ultimate value of 120*l.* with a subscription of 10*s.* a month, that members should join in successive groups and that they should pay their subscriptions for fourteen years or till such time as each of the shares of the same date should have reached 120*l.* There was the usual rule as to withdrawal, and it was also provided that the funds of the society should belong to the members in proportion to the time they had been subscribers, and that no dissolution should be completed until the close and maturity of all shares in existence. The result of the liquidation was that after the advanced members had redeemed their securities and all debts to third parties had been paid, there remained a surplus sufficient to pay each unadvanced shareholder about 10*s.* in the pound on the value of his shares, according to the period of his subscription at the date of the winding-up order. It was held that no call could be made to equalize the value of the shares, and that the surplus was divisible among the unadvanced members *pro ratâ* according to their respective periods of subscription.

Re Middlesbrough, &c. Building Soc'y.

A similar decision was given in the case of *Re Middlesbrough, Redcar, and Saltburn, &c. Building Society* (*b*). There the rules provided that when it should be deemed advisable to bring the operations of the society to a termination, a general meeting should be held which should have power to dissolve the society,

(*b*) (1889), 58 L. J. Ch. 771; 5 T. L. R. 516. The decisions in this and the *Doncaster Case* were followed by the Full Court in New South Wales in *Strand* v. *Permanent Mutual Benefit Building and Investment Society* (1897), 18 N. S. W. R. Eq. 194.

and when all payments due to the society by members or any other person had been satisfied and the debts had been paid, the stock of the society should be divided among the members according to the respective number of unadvanced shares which each member might have standing to his credit in the books, and allowing the fair proportionate rate of profits upon each such share according to the duration of their payments to the society; but the rules contained no provision for the case of a compulsory winding-up. The learned judge, Stirling, J., held that the surplus assets must be distributed as nearly as might be according to the interests of the members of the society as they stood at the commencement of the winding-up, and that on those of the unadvanced members who were in arrear at the date of the winding-up order paying up or bringing into account what was owing from them at that date, they and the other unadvanced members would be entitled to the assets in proportion to their interest in the society (*c*). But a member in arrear at the commencement of the winding-up, whether holding only uncompleted shares in arrear or also holding completed shares or uncompleted shares not in arrear, cannot participate in the surplus assets in respect of any shares held by him without paying-up or bringing into account the arrears in respect of all his shares (*d*).

Arrears.

In *Re West London and General Permanent Benefit Building Society* (*e*) a scheme of arrangement had been

Division of ultimate residue.

(*c*) 58 L. J. Ch. p. 778.
(*d*) *Re Conservative Land Society*, Mar. 19th, 1902, Byrne, J., where the society was unincorporated.
(*e*) (1898), 78 L. T. 393; 14 T. L. R. 304; 42 Sol. J. 363.

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sanctioned, the last clause of which provided that the residue should be "divided amongst the unadvanced shareholders." At the date of the order it was not anticipated that there would be any residue, but in the event it proved that there was. The Court of Appeal held, reversing the order of Wright, J., that the residue must be divided according to the rights of the shareholders under the rules of the society.

Assets acquired *ultra vires*.

In the winding-up of the Birkbeck Society the House of Lords was called upon to determine the proper mode of distributing the assets where they had been swollen by reason of the society having for many years carried on an *ultra vires* banking business, in the course of which it had received money to a very large amount from the customers of that business, both on deposit and on current accounts. The rules of the society contained an unlimited power to borrow, but this, it was held, must be confined to borrowing for the proper objects of the society, and afforded no legal justification for the receipt of the moneys accepted from the customers. The Court of Appeal, following the decision in *Re Guardian Permanent Benefit Building Society* (*f*), had held that the customers were entitled only to what was left of the assets after the shareholders had been paid in full. The House of Lords, however, took a different view, and considered that the assets remaining after payment of the outside creditors must be taken to represent in part moneys which the customers could follow, as having been invalidly borrowed, and in part moneys which the society could follow, as

(*f*) (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 32 W. R. 73; 48 L. T. 134.

having been wrongfully employed by its agents in the banking business. They accordingly held that, subject to any application by any individual customer or shareholder with a view to tracing his own money into any particular asset, and to the costs of the liquidation, the assets must be distributed *pari passu* between the customers and the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding-up (*g*).

Refunding.

This decision gave rise to another question: the liquidator, before he had received notice of the appeal to the House of Lords, had acted on the order of the Court of Appeal and paid the shareholders in full, with the result that when the rights of the parties were finally determined it appeared that the shareholders had been overpaid, to the prejudice of the customers, to the extent of 4*s*. in the pound. It was held by Neville, J., that the amount thus received in excess must be refunded (*h*).

Unclaimed dividends.

Unclaimed dividends should be paid into the Companies Liquidation Account at the Bank of England and not into Court (*i*), and for this purpose the trustees should make application to the Inspector-General in companies liquidation (1, Horse Guards Avenue, S.W.)

(*g*) *Sinclair* v. *Brougham*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. J. 302.

(*h*) *Re Birkbeck Permanent Benefit Building Society*, [1915] 1 Ch. 91; 84 L. J. Ch. 189; 112 L. T. 213; 31 T. L. R. 51; 59 Sol. J. 89; (1915), H. B. R. 31.

(*i*) Companies (Consolidation) Act, 1908, s. 224; Companies (Winding-up) Rules, 1909, rr. 191—196; Building Societies Act, 1894, s. 8; *Re Manchester Provident Permanent Benefit Building Society*, Palatine Court of Lancaster, March 12th, 1900.

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for a receivable order. This provision applies not only to a compulsory but also to a voluntary liquidation, whether under supervision or not (*j*); this would seem to include the case of a dissolution under an instrument of dissolution.

Vesting order under sect. 272.

The property of an unincorporated building society being vested in trustees, an application for a vesting order under sect. 272 of the Companies (Consolidation) Act, 1908, generally becomes necessary in the course of the winding-up; see this section, *ante*, p. 373.

Application, how made.

The application, if subsequent to the winding-up order, is by motion in the name of the society (*k*). Notice of the motion should be served on the trustees (*l*).

Effect of vesting order.

The effect of an order under the section is to vest the property in the liquidator not in his personal capacity, but in his official capacity as official liquidator appointed by the Court to assist the Court in winding up the society. Consequently, where an action was brought against official liquidators in their personal capacity to recover arrears of a rent-charge, payable in respect of property of which they had taken possession in pursuance of a vesting order, it was held that the action was manifestly groundless and oppressive, and must be stayed accordingly (*m*).

(*j*) *Re Stock and Share Auction and Banking Co.*, [1894] 1 Ch. 736; 63 L. J. Ch. 245; 42 W. R. 300; 70 L. T. 235; 1 Mans. 125.

(*k*) *Re Britannia Permanent Benefit Building Society* (1890), 63 L. T. 304; W. N. 170.

(*l*) *Re Albion Society* (1888), 57 L. J. Ch. 248.

(*m*) *Graham* v. *Edge* (1888), 20 Q. B. D. 538, 683; 57 L. J. Q. B. 406; 36 W. R. 529; 58 L. T. 860; 2 Meg. 1; and see *Re Blackburn and District Benefit Building Society, Ex parte Graham* (1889), 42 Ch. D. 343; 59 L. J. Ch. 183; 38 W. R. 178; 61 L. T. 745; 2 Meg. 1; 5 T. L. R. 565, where an unsuccessful

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Exercise by liquidators of powers of sale in mortgages to the society.

An important question arose under this section as to the exercise by liquidators of a power of sale contained in one of the society's mortgages. The mortgage was made to trustees in the usual way, and provided that, in case of default by the mortgagor, the property should be held upon trust that the trustees for the time being should, if and when required by the directors of the society, sell the property. By an order made in the winding-up, six of the directors were appointed liquidators, and it was ordered that all the acts required or authorized by the Act to be done by the official liquidators, might be done by any two of them. By another order it was ordered that all such property real and personal, including all interest claims and rights in, to, and out of property real and personal, and including things in action, as might belong to or be vested in the society, or to or in any person or persons in trust for or on behalf of the society, should vest in the official liquidators, and that they should be at liberty to exercise any of the powers conferred on them by sect. 95 of the Act of 1862 (*n*) without the sanction of the Court. Two of the six liquidators, without any further sanction of the Court, sold and conveyed the mortgaged property to a purchaser freed and discharged from the mortgage. The question arose whether, under these circumstances, the purchaser got a good title, and there was a considerable difference of judicial opinion. North, J., held that the trust for sale was properly

claim was made in the winding-up to recover these arrears. This last case was distinguished in *Cundiff* v. *Fitzsimmons*, [1911] 1 K. B. 513; 80 L. J. K. B. 422; 103 L. T. 811.

(*n*) Now s. 151 of the Act of 1908.

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exercised, and the legal estate effectually vested in the purchaser. On appeal, Lord Esher, M. R., and Cotton, L. J., held, Fry, L. J., *dubitante*, that the power of sale was validly exercised; while Cotton and Fry, L. JJ., Lord Esher, M. R., dissenting, held that the conveyance only passed the legal estate in two-sixths of the mortgaged property (*o*).

Exercise of powers.

In a subsequent case, where a vesting order was applied for, the Court made the order, but the learned judge, Kay, J., held that the right to exercise the powers conferred by sect. 95 of the Companies Act, 1862, without the sanction or intervention of the Court, could not be allowed, and this part of the application was accordingly refused (*p*).

Scotland.

It has been held in Scotland in the winding-up of an incorporated society under a supervision order, that a liquidator appointed by the sheriff, on calling up a loan made by the society, has power by virtue of his appointment to reconvey the property held as security for the loan (*q*).

Security for costs.

Where the official liquidator took out a summons in the winding-up against the manager to make him liable for certain moneys of the society, Bacon, V.-C., ordered the liquidator to give security for costs (*r*).

(*o*) *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23; 58 L. J. Ch. 665; 37 W. R. 657; 60 L. T. 841.

(*p*) *Re Britannia Permanent Benefit Building Society* (1890), 63 L. T. 304; W. N. 170.

(*q*) *Scottish Property Investment Company Building Society* v. *Maclaren* (1882), 19 Sc. L. R. 891.

(*r*) *Re Seventh East Central Building Society* (1884), 51 L. T. 109; but the authority of this decision is very questionable: see *Re W. Powell & Sons*, [1896] 1 Ch. 681; 65 L. J. Ch. 454; 44 W. R. 618; 74 L. T. 220; *Re Strand Wood Co.*, [1904] 2 Ch. 1; 73 L. J. Ch. 550; 90 L. T. 800; 53 W. R. 69; 11 Mans. 291.

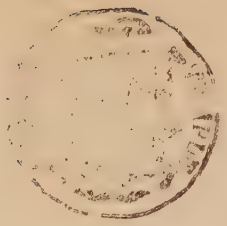
Notice of the termination of the winding-up of an incorporated society must be given in duplicate to the registrar within fourteen days from the termination of the winding-up in the Form AD annexed to the Regulations, and the registrar will return one copy to the society, indorsed with the word "Registered," and duly authenticated (*s*).

Notice of termination of winding-up to be given to the registrar.

A fee of two shillings and sixpence is payable for registry of notice of the termination of a winding-up (*t*).

Fee.

(*s*) Building Society Regulations, 1895, r. 29.
(*t*) *Ibid.* r. 41.



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